Wm. A. Dinsmore.

CORNELL UNIVERSITY,

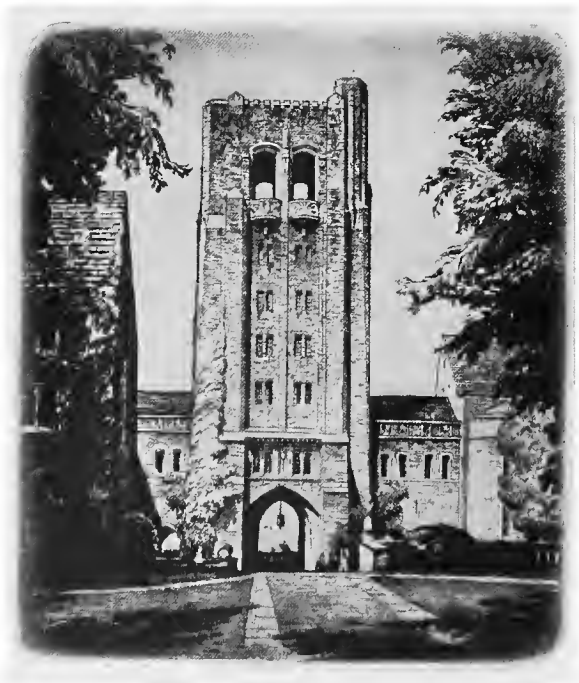
COLLEGE OF LAW.

CIVIL PROCEDURE.

Selected Motion Papers.

No. I.

HENRY S. REDFIELD.



SUPREME COURT,

COUNTY OF NEW YORK.

ABBIE S. SHAW, EMMA S. SHAW, CHARLES F. ULRICH, suing on behalf of themselves and all other stockholders of the Burt Switch Company who shall come in and contribute to the expenses of this action,

Plaintiffs,

against

WILLIAM P. BURT, WINFIELD S. GILMORE, S. MARSH YOUNG, WILLIAM F. COCHRAN, IRVING INGRAHAM, CHARLES E. PARKER, JOHN L. HOUSTON, WALSINGHAM A. MILLER, W. SEWARD WEBB, THOMAS L. JAMES, WILLIAM J. ARKELL, FREDERICK B. MITCHELL, THE BURT SWITCH COMPANY, JOHN DOE and RICHARD ROE, the last two names being used to designate defendants whose names are unknown to the plaintiffs,

Defendants.

Complaint.

The plaintiffs, by John Hepburn, their attorney, complaining on behalf of themselves and all other stockholders in The Burt Switch Company who shall come in and contribute to the expenses of this action, respectfully show to the Court and allege as follows:

FIRST. That Abbie S. Shaw, one of the above-named plaintiffs, was in the year 1892, and ever since

5 has been, the owner and holder of eight shares of the common stock of the capital stock of The Burt Switch Company, a corporation hereinafter described, of the par value of $100 each. And said Emma S. Shaw, one of the above-named plaintiffs, was in the year 1892, and ever since has been, the owner and holder of five shares of the common stock of the capital stock of said corporation of the par value of $100 each. And said Charles F. Ulrich, one of the above-named
6 plaintiffs, is the owner and holder of one hundred shares of said capital stock.

SECOND. That, as plaintiffs are informed and believe, one E. S. Hollister, hereinafter referred to, departed this life in or about the year 1892.

THIRD. That, as plaintiffs are informed and believe, there are more than 200 stockholders of said corporation, the names of some of whom are unknown to
7 plaintiffs, and the residences of nearly all of whom are also unknown.

FOURTH. That, as plaintiffs are informed and believe, the Burt Switch Company is, and has been ever since the month of November, 1889, an incorporation created by and under the laws of the State of Maine, having its principal office in the City of New York for doing its business.

8 FIFTH. That, as plaintiffs are informed and believe, in or about the year 1892, by certain representations made, as hereinafter stated, to certain of the members of the firm of George P. Bissell & Company, doing business as bankers and brokers, and who have a large clientage of investors, said firm, and through them the plaintiffs, or some of them, were induced to buy and pay for said stock so held by them as aforesaid,

which they did in good faith, and that the facts in reference to the misconduct of the individual defendants as set forth herein have been discovered since that time.

SIXTH. That, as plaintiffs are informed and believe, at its organization the capital stock of said corporation was fixed at $1,000,000, divided into 10,000 shares of the par value of $100 each ; 9,000 shares thereof being common stock, and 1,000 shares thereof being made preferred stock. That the objects of the company included the making, selling and construction of railway switches, and switch devices upon methods and under patents formerly owned or used by a former coporation known as The Burt Railway Switch Company, located at Meriden, Connecticut, of which Alvah W. Burt, or his father, was, or had been, the principal officer; and under methods and patents which had been owned or used by Alvah W. Burt or under both, and under such improvements as they might make and acquire in the conduct of the business. The directors of said Burt Switch Company at its organization were William P. Burt, who was a brother of said Alvah W. Burt, Winfield S. Gilmore and S. Marsh Young.

SEVENTH. That, as plaintiffs are informed and believe, on or about the 22d day of November, 1889, the Board of Directors of the said defendant The Burt Switch Company duly passed a resolution providing that the preferred stock of said company then unsold on or after Saturday, November 23d, 1889, be held at $100 per share, and the common stock be held at $75 per share, except such shares of stock as might be out upon written options at that time.

EIGHTH. That, as plaintiffs are informed and be-

13 lieve, on the 6th day of January, 1890, there was in the treasury of the said defendant The Burt Switch Company 1,000 shares of the preferred stock of the said company (being all of that class of stock) and at least 4,745 shares of the common stock of said company, all of which belonged to said company and all of which shares were actually in the treasury and held by the corporation as treasury stock.

NINTH. That, as plaintiffs are informed and believe,
14 prior to June, 1890, the directors of said company assumed to increase the Board of Directors thereof to seven members; and at the annual meeting of stockholders held in June, 1890, the stockholders assumed to elect seven directors, including said defendant William F. Cochran, and he thereupon became a director of said company *de jure* or *de facto* and took his seat as a director in the board of said company and acted as such thereafter, and until the annual
15 meeting of said company held in June, 1893.

TENTH. That, as plaintiffs are informed and believe, on or before January 16th, 1891, William P. Burt, being then the president of said company, assumed to sell 270 shares of the preferred stock of said company, belonging to the company, to said William F. Cochran, he being then one of the directors of said company, for the sum of $85 per share, and 214 shares of the common stock so belonging to said company at
16 $50 per share, notwithstanding the resolution of the board hereinbefore stated, fixing the price of said stock at $100 for the preferred stock, and $75 per share for the common stock, and at a meeting of the directors held on that day at which only the said defendants William P. Burt, William F. Cochran, Winfield S. Gilmore and Irving Ingraham were present, and at which the presence of said defendants Burt and Cochran was neces-

sary to constitute a quorum, and the vote of one of them was necessary to ratify the sale made by them, a resolution was adopted by the vote of those present purporting to ratify said sale, and said resolution was entered in the minutes of the board of said company, as if a valid act of the corporation by its board, and said Cochran took and now holds said shares of stock as his own. 17

ELEVENTH. That, as plaintiffs are informed and believe, as early as on the 16th day of January, 1891, sales of the treasury stock had been made to an amount which would put the company in funds necessary for doing the business of the year. 18

TWELFTH. That, as plaintiffs are informed and believe, thereupon and at a meeting of the Board of Directors held on said last-mentioned day, it was ordered, by resolution of the directors duly passed, that the balance of the company's stock be held at par, and that none be sold at a less price except on the unanimous vote of the Board of Directors, and as plaintiffs are informed and believe, said last-mentioned resolution has never been rescinded, except in so far as it may have been modified by the action of the board hereinafter stated, but has been several times disregarded and wrongfully evaded for the private advantage of said defendants acting as directors, or some of them. 19 20

THIRTEENTH. That, as plaintiffs are informed and believe, on or about May 12th, 1891, at a meeting of directors of said corporation, the directors present adopted the following resolution, of which they caused a copy to be entered on the minutes of the board as if it were a regular and valid act of the corporation by its board :

21 "On motion duly made and seconded, it was voted "that the president and treasurer be authorized to sell "not to exceed 200 shares of the stock of the company "to net not less than $90 per share." And that the directors present at said last-mentioned meeting were said defendants William F. Cochran, Irving Ingraham, E. S. Hollister and Winfield S. Gilmore, who was then treasurer of said company, and William P. Burt, who was then its president. That the presence of the said
22 defendant Gilmore, or said defendant Burt, was essential to make a quorum at said meeting, and the vote of both was necessary to the passage of said resolution.

FOURTEENTH. That, as plaintiffs are informed and believe, on or about October 10th, 1891, at a meeting of five directors of said company, held in the City of New York, at which said defendants William F. Cochran, Winfield S. Gilmore and William P. Burt were present, and at least two of whom were neces-
23 sary to constitute a quorum, and all three of whom were necessary to a vote, a resolution was unanimously adopted, of which the following is a copy:

"On motion duly made and seconded, it was unani- "mously voted that the company, having lately ac- "quired and secured the control of some improved "mechanical switches and appliances pertaining to "our business, it will be necessary to have some cash "capital to place the same in the market, also to in-
24 "crease the production of switches, etc., the demand "for which exceeds our facilities for manufacturing; "therefore, in order to raise said additional capital, it "was voted that the stockholders of record, on Oc- "tober 20th, 1891, be given an option to purchase an "equal amount of treasury stock to their present hold- "ings, at $50 per share, said option to hold good until "November 20th, 1891."

FIFTEENTH. That, as plaintiffs are informed and 25
believe, at the time of said vote, the said voting directors and said Alvah W. Burt, and the holders representing the former Burt Railway Switch Company, held as stockholders, including stock which said directors had transferred to themselves as aforesaid, nearly all of the stock that had theretofore been issued, and which was then outstanding and not in the treasury of the company, and that, at or about this time, or not long before and after, said stock was salable and was 26
actually sold at par or near par.

SIXTEENTH. That, as plaintiffs are informed and believe, in or prior to March, 1892, the directors of said company—the board consisting of or being controlled by said defendants William P. Burt, William F. Cochran, Winfield S. Gilmore and S. Marsh Young —employed the defendant Frederick B. Mitchell as a salaried agent of the company, ostensibly as its special attorney, for the sale of its stock, and that he so repre- 27
sented himself to said members of the firm of George P. Bissell & Company, and in that capacity made the representations hereinafter stated to have been made by him.

SEVENTEENTH. That, as plaintiffs are informed and believe, in the months of March, April and May, 1892, in order to induce said firm of George P. Bissell & Company, and through them their customers, and 28
among others the plaintiffs, or some of them, to purchase stock of said company, said Mitchell represented to said George P. Bissell & Company, that, among other things, the said Burt Switch Company was managed ably and economically; that the salaries of the salaried officers and employees were in each case a low salary, and that the office expenses and other necessary expenses were reduced to the lowest possible

sum consistent with good management, and that the salary of the president did not exceed $3,600 per annum, and that said defendant Winfield S. Gilmore, who was then acting as treasurer, was so acting without any compensation by way of salary. And plaintiffs further say that their purchases of and the transactions of said George P. Bissell & Company in said stock were made in good faith, and in reliance on these representations and similar ones made from the New York office of said company.

EIGHTEENTH. That, as plaintiffs are informed and believe, thereafter and after said defendant Frederick B. Mitchell had opened negotiations with investors to induce them to purchase shares of the stock of said company in the belief that they were purchasing treasury stock from the company, and after said William P. Burt had learned that the common stock of said company could then be sold to such investors at or near par, said William P. Burt and two other directors present at a meeting held in the City of New York on May 2d, 1892, adopted the following resolution, which they entered on the minutes of the board, as if it were a regular and valid act of the corporation by its board:

"On motion, duly made and seconded, it was voted "that William P. Burt is hereby authorized to pur- "chase from this company 500 shares full paid com- "mon stock at $50 per share, said sale being author- "ized at said price to remunerate William P. Burt for "extraordinary services rendered."

The plaintiffs charge and allege that at the meeting of the said directors of the said company, at which said last-mentioned resolution was passed, only the following directors of the said company were present, namely, William F. Cochran, Winfield S. Gilmore and

William P. Burt, and that the presence of said William P. Burt was necessary to make a quorum at said last-mentioned meeting, although, as plaintiffs are informed and believe, it was not sufficient, but, on the contrary, there was not a sufficient number of directors there present to constitute a quorum. 33

NINETEENTH. That, as plaintiffs are informed and believe, the defendant William P. Burt, contrary to his duty as a director and as president of said corporation, and without authority, and knowing that the stock of said company could then be sold by the company at a better price, took from the treasury of said company the stock those in combination with him had voted to him, and used a part at least of said stock, on or about May 21, 1892, and thereafter in June, 1892, an additional part thereof, to fill orders for stock which had been previously obtained by said company's said special attorney, Frederick B. Mitchell, from investors and from persons dealing in said stock at or above $90 per share, appropriating the stock and said orders to himself, said William P. Burt, and receiving himself the price over and above about $50 per share, to-wit, about the sum of $18,800, for which the plaintiffs are informed and believe he has never accounted to the company. 34 35

TWENTIETH. That, as plaintiffs are informed and believe, the defendants William P. Burt, Winfield S. Gilmore and William F. Cochran, or some of them, while members of the board, were voting to sell treasury stock to themselves or to their friends or business associates at $50 per share, they were selling like stock held by themselves individually at $90 per share and upwards. 36

TWENTY-FIRST. That, as plaintiffs are informed and

37 believe, during all the period of the transactions herein mentioned, the said president was receiving from the company an adequate salary in money for all of his services.

TWENTY-SECOND. That, as plaintiffs are informed and believe, on or about June 8th, 1892, at an annual meeting of the stockholders of said company, held in Maine, said W. S. Gilmore, the treasurer, and one of the directors, represented to the stockholders then
38 present that the corporation required an additional capital of one million dollars, making two million dollars in all, and that it was necessary that 10,000 shares of common stock of the par value of $100 each should be issued; thereupon it was voted by the stockholders of said company to make such increase, and it was further voted as follows:

"On motion, duly seconded, it was voted that the
39 "directors of this corporation be, and they are hereby, "authorized and empowered to take control and charge "of the 10,000 shares of stock, added by the foregoing "vote and increase, and cause the same to be issued "and use the same if they deem it to be for the best "interest of said corporation in the purchase of such "property, patents and rights as they may deem best "for the interests of the corporation, to be acquired "for its uses, and to take such action in the premises "as they, in their judgment, shall deem best for the
40 "interest of the corporation."

TWENTY-THIRD. That, as plaintiffs are informed and believe, the said board, or said defendants Winfield S. Gilmore, William F. Cochran and William P. Burt, acting as the board, issued said 10,000 shares of new stock of said corporation in payment for patents thereby acquired by said corporation, which said last-

mentioned defendants then valued at the full sum of 41
$1,000,000.

TWENTY-FOURTH. That, as plaintiffs are informed and believe, the by-laws of said corporation authorized and directed the Board of Directors thereof to make or caused to be made certificates of stock of the said corporation of such form and device as said board should direct. That the said board did prepare and adopt as the form and device of said certificates, one which stated, among other things, that said stock 42
issued by said corporation from time to time was "full paid and unassessable," and, as the plaintiffs are informed and believe, all the certificates of stock issued by said company bear said statements on the face thereof.

TWENTY-FIFTH. That, as plaintiffs are informed and believe, on or about July 6, 1892, the defendant William P. Burt, as president, ostensibly acting in be- 43
half of the directors, issued to the stockholders of the company a circular, of which the following is a copy:

THE BURT SWITCH COMPANY,
50 Broadway.

NEW YORK, July 6th, 1892.

To the Stockholders of the Burt Switch Company:

You are hereby advised that at a meeting of the 44
board of directors of this company, held on the 1st day of this month, it was voted that stockholders of record of July 1st, 1892, be, and are hereby, given an option for thirty days from date to purchase additional shares of new stock of this company, to the amount of 20 per cent. of their holdings on this date, at the rate of fifty dollars ($50) per share, the proceeds of

such purchases to be used for the purchase of a controlling interest in the stock of the Johnson Railroad Switch Company, of Rahway, N. J., and for the further development of the business of this company.

Stockholders will please advise the company of their acceptance of this option at their early convenience.

(Signed) WILLIAM P. BURT,
President,
For the Board of Directors.

TWENTY-SIXTH. That, as plaintiffs are informed and believe, the Johnson Railway Switch Company referred to in the foregoing circular, is and was a corporation organized and existing under the laws of the State of New Jersey, for making railway switches, and that the directors of the defandant The Burt Switch Company, by means of representations contained in said circular, and other representations for the like purpose, induced the stockholders of The Burt Switch Company to subscribe and pay for 2,000 shares of the common stock of The Burt Switch Company, for the aggregate amount of $100,000, which sum the said Burt Switch Company received. That the directors of the said Burt Switch Company had agreed with the Johnson Railroad Switch Company, or the shareholders thereof or some of them, for the purchase of about 773 shares of said Johnson Railroad Switch Company for the sum of about $114,000, which price said president and said directors, or some of them, had notice was greatly in excess of the value thereof.

TWENTY-SEVENTH. That, as plaintiffs are informed and believe, instead of applying the moneys received from the issue and sale of said 2,000 shares of stock in payment of the indebtedness mentioned, and for

which the directors of the Burt Switch Company rep- 49
resented they needed said money, they, said directors, had, nine months afterwards, applied only the sum of $34,400, leaving due on the purchase price of the Johnson Railroad Switch Company's stock a sum which, on July 6th, 1894, amounted, with interest, to a debt of over $50,000, to secure the payment of which they had left all of the Johnson Company's stock, for which they had contracted, in the hands of a trustee, and had, moreover, pledged other securities 50
belonging to the Burt Switch Company as further security, and had still left said balance of the purchase price unpaid, and the same, or a large part of it, still remains unpaid, and that, by their ill-advised and improvident management and neglect in this behalf of the interest of the said Burt Switch Company, its property and moneys were imperilled and wasted, or liable to be wasted; and that the chief value of a controlling interest in the Johnson Railroad Switch Company to the Burt Switch Company consisted then and 51
ever since in the fact that the Johnson Railroad Switch Company had obtained an injunctive judgment of the Court prohibiting the use of the device or devices controlled by certain patents known as the Sykes system, which system was owned or controlled by said Johnson Railroad Switch Company.

TWENTY-SEVENTH (A). That, as plaintiffs are in- 52
formed and believe, the said company in or before the summer and fall of 1892, earned enough net profits to declare and pay in the month of July of that year a dividend of 6 per cent. on the preferred stock and a dividend of 1½ per cent. on the common stock, and in October or November a dividend of 1½ per cent. on the common stock, and that said defendants William P. Burt, Winfield S. Gilmore and Frederick B.

53 Mitchell, represented to various stockholders that said dividends had been so earned and declared. And plaintiffs further so allege that dividends to that amount were at or about those times actually paid, but that no other dividends have since been paid on the part of the stock of said company.

TWENTY-EIGHTH. That, as plaintiffs are informed and believe, one Adoniram J. Wilson was for a con-
54 siderable period, including, as plaintiffs are informed and believe, the years 1892 and 1893, in the employ of the company as its superintendent at a fixed salary; and the inventions and improvements made by him and affecting the patented improvements or devices and business of the said Burt Switch Company during his said employment were rightfully regarded by him and by the company as belonging to said company; and on August 4th, 1892, he made several assignments to the company of such inventions and improvements.
55 Nearly or more than a year and a half thereafter, and without any further assignment or consideration, the defendants William P. Burt, Charles E. Parker and Winfield S. Gilmore, in order to obtain the control and disposal of 3,000 shares of the stock of the company, assumed to pass the following resolution at a meeting of directors held in the City of New York:

"That as it had been agreed between the Burt
"Switch Company and Adoniram J. Wilson that the
56 "latter should assign and transfer to said company
"his entire interest in all the inventions of railroad
"switching devices in and for the United States, and
"in all United States patents granted therefor, and
"that said company should pay the said Wilson suit-
"able compensation therefor, to be agreed upon, and
"as the said Wilson had, from time to time, so trans-
"ferred his inventions of the United States applica-

"tions and patents to the Burt Switch Company, and 57
"in pursuance of the said agreement, and as, in the
"judgment of the Board of Directors, the United
"States applications and patents are equal in value to
"3,000 shares of the common stock of this company,
"and the said Wilson has agreed to accept that amount
"of stock in full payment to date for all such inven-
"tions, applications and patents, W. S. Gilmore, treas-
"urer, be, and he is hereby, authorized and directed to
"transfer and cause to be transferred to Adoniram J. 58
"Wilson, 3,000 shares of the full paid common capital
"stock of the Burt Switch Company out of the balance
"of 10,000 shares of stock set over and assigned and
"transferred to this company by William P. Burt and
"W. S. Gilmore on July 6th, 1892, and the said 3,000
"shares to be accepted by Adoniram J. Wilson in full
"payment to date for any and all claims of the said
"Wilson against the said Burt Switch Company for
"said applications and patents."

59

That the only directors present at said meeting were the said Burt, Parker and Gilmore, and they did not constitute a quorum, and if they had done so the votes of at least two would have been necessary; that they caused the resolution to be entered in the minutes of the Board of Directors of said Burt Switch Company, under date of December 22d, 1893, as if it were a valid act of said corporation by its board.

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TWENTY-NINTH. That the plaintiffs are informed and believe, the said Wilson paid no consideration for said last-mentioned three thousand shares of said stock, and never received nor controlled nor disposed of said stock for his own benefit or in his own right, but that the entire transaction was a device and pretext to enable the said president, William P. Burt, and said

61 treasurer, Winfield S. Gilmore, to take and dispose of said stock at their own pleasure, which they did.

THIRTIETH. That, as plaintiffs are informed and believe, on or about the 4th day of May, 1894, the defendant William P. Burt, who was then president of said corporation, at a meeting of directors of the said corporation, held in the City of New York, and the following directors who were present, viz., Charles E. Parker, Walsingham A. Miller and Winfield S.
62 Gilmore, adopted the following resolution, of which they caused a copy to be entered on the minutes of the board, as if it were a regular and valid act of the corporation by its board, namely:

"On motion duly made and seconded, it was voted "that the salary of William P. Burt, as president of "The Burt Switch Company, be, and is hereby, fixed "at the sum of $10,000 per annum, the said sum to "be payable in equal monthly installments of $833.33
63 "each, and the said salary to be payable as from Jan-"uary 1st, 1894," and plaintiffs are informed and believe said William P. Burt demanded and received, and took, from the treasury of said company, and out of the corporate funds of said company, the said sums so claimed by him to have been voted to him by said last-mentioned resolution as and from the first day of January, 1894. And that the only directors present at said last-mentioned meeting were said defendants,
64 Charles E. Parker, Walsingham A. Miller, Winfield S. Gilmore and William P. Burt, who was then its president, and that the presence of said defendant William P. Burt, was essential to make a quorum at said meeting and his vote was necessary to the passage of a resolution.

THIRTY-FIRST. That the plaintiffs further say that they are informed and believe that there are many

other transactions of the defendants as directors, 65
officers, agents or employees of said corporation by which the said company has been impoverished and its affairs neglected and the same mismanaged to the unlawful pecuniary advantage of themselves, or some of them, and that a discovery and accounting in reference thereto and in reference to matters hereinbefore stated is necessary to protect the rights of said corporation and its stockholders.

66

THIRTY-SECOND. That plaintiffs are informed and believe that it is provided in the Revised Statutes of of the State of Maine, which were in force during the time covered by all the transactions herein alleged and under which said defendant was incorporated, that "all corporations shall keep at some place within the "State, a clerk's office containing the records and "books, which at seasonable hours shall be open to "the inspection of persons interested, who may take 67
"copies and minutes therefrom of such parts as con-"cern their interests, and have the same produced in "court on trial of an action in which they are inter-"ested when they can be used as evidence." And plaintiffs further allege that they are informed and believe that none of the transactions mentioned in this complaint have been entered in any books kept in the office of said corporation in the State of Maine, except entries purporting to be minutes or records of meet-
ings of stockholders, including those herein mentioned, 68
and no other information respecting the company's affairs or the stockholders' interests material to this action has been recorded in such books, or otherwise made accessible to the stockholders.

THIRTY-THIRD. That, as plaintiffs are informed and believe, the by-laws of said corporation provide that the

69 treasurer "at each annual meeting of the stockholders "shall submit a complete statement of his accounts "for the past corporate year, with the proper vouchers "for their information." And the plaintiffs further allege that at the annual meeting of the stockholders of said company held in June, 1893, the treasurer made what purported to be the requisite statements for the year ending June 1st, 1893. That said account contained no indication whatever that anything had been
70 received during said year for capital stock issued or sold by said corporation, although plaintiffs charge that more than $100,000 in money had been so received by the directors or treasurer for treasury stock sold or disposed of, and that thereafter, but only after repeated and persistent inquiries made of the treasurer and directors of said corporation on behalf of the plaintiffs and others, by their agent, the treasurer represented, on or about December 13, 1893, among other things, that the total amount of cash paid in for
71 all capital stock to June 1st, 1893, is $420,079.94. That in truth, as plaintiffs are informed and believe, the amount of money so received from the sales of capital stock was greatly in excess of said last-mentioned sum, to-wit, at least $600,000.

THIRTY-FOURTH. That, as plaintiffs are informed and believe, in and by said account of the treasurer, it appeared that the value of the real estate and factory
72 was $51,067.54; of machinery and tools, was $34,-119.42; of merchandise and stock on hand, was $46,-608.74; that the total receipts for the year, including amounts due on contracts completed and uncompleted, and merchandise purchased, was $434,373.10; but, as plaintiffs are informed and believe, the real estate mentioned instead of being of the value of about $51,068, was, or should have been with proper man-

agement, of the value of at least $75,000; that the 73
machinery and tools, instead of being of the value of about $34,120, were, or should have been with proper management on the part of the directors, of the value of $120,000; that the merchandise or materials on hand, instead of being only of the value of about $46,609, were, or should have been with proper management on their part, of much greater value; that the cash and moneys estimated as having been received on existing or completed contracts, instead of amount- 74
ing only to about $434,374, were, or should have amounted with proper management on their part, to nearly twice that sum. And plaintiffs charge that other matters were wrongfully omitted from said account, and other matters included therein were erroneously stated, and that said account was not entered on the minutes of the meeting of said stockholders.

THIRTY-FIFTH. Plaintiffs further allege, on information and belief, that in and by the by-laws of 75
said company it is provided, among other things, that the books and papers in the office of the clerk and assistant clerk of said corporation shall at all times, in business hours, be open to the inspection of the Board of Directors and of any stockholders of record; but that although the plaintiffs, or some of them, through their agent thereto duly authorized, has or have from time to time, and in business hours, requested the said clerk or assistant clerk and the various officers of said 76
corporation to make a fuller account showing intelligibly the financial condition of said company, such requests have been, in whole or great part, denied, and plaintiffs, although they have requested to see the record and other books which stockholders are by law and by courtesy entitled to see, were refused access to the same until on or about July 5th and 6th, 1894, more than five months after the said request was made

77 as aforesaid, and it is only by means of these inquiries and by access to some of the books thus obtained that a large part of the facts hereinbefore alleged were ascertained.

THIRTY-SIXTH. That, on information and belief, the plaintiffs further allege that they, or some of them, through their said authorized agent, particularly requested the Board of Directors to exhibit to them such books of said corporation as would show the number
78 of shares of stock issued from time to time and the consideration received by said corporation therefor, but the books of said corporation, if any, showing such issues of stock, together with all books showing, or tending to show, the receipts for stock sold as aforesaid, have been uniformly withheld by said defendants constituting a majority of the present Board of Directors.

79 THIRTY-SEVENTH. That, as plaintiffs are informed and believe, the said defendants, or some of them, while pretending to act in behalf of said defendant the Burt Switch Company, have from time to time bought, with the funds of said corporation, certain shares of stock theretofore issued to certain persons or corporations without the assent of the plaintiffs or the other stockholders of said corporation.

THIRTY-EIGHTH. That, as plaintiffs are informed
80 and believe, said defendants William P. Burt, Winfield S. Gilmore and William F. Cochran intended by the combination herein set forth, and by the issue of the said stock of said corporation to said Burt or to said Burt and Gilmore, or to other persons in their employ or control, to gain and have control of the corporation and dictate the corporate acts and the acts of the Board of Directors of said corporation at the several

meetings of the said corporation and at all the meet- 81
ings of the stockholders of said corporation, and that the said defendant Parker took part in many of the acts of said William P. Burt, Gilmore and Cochran, hereinbefore mentioned, and now approves of their acts and course aforesaid.

THIRTY-NINTH. That, as plaintiffs are informed and believe, on or about the twenty-second day of December, 1893, said Adoniram J. Wilson, without receiving 82
any consideration therefor, transferred 1,000 of said 3,000 shares of stock so transferred to him to the defendant W. Seward Webb, and 2,000 shares thereof to the defendant William J. Arkell, and that shortly thereafter said defendant William J. Arkell transferred 100 shares thereof to W. R. Robeson, and 50 shares thereof to George H. Daniels, and that neither of said defendants paid to said Wilson or to said corporation any money, nor did they, nor either of them, 83
furnish any other valuable or adequate consideration for the transfer of said 3,000 shares of stock to them or either of them, but said four last-mentioned defendants took and accepted said 3,000 shares of stock, and all of them with full knowledge and notice that the same had been issued by said corporation without valuable, legal or adequate consideration therefor, and said defendants have and hold the said shares of stock in said proportions as stated in this clause. But
plaintiffs are informed and believe, that the said last- 84
mentioned defendants, or some of them, have transferred a part of said shares so held by them, but the person or persons to whom they have transferred the same have not paid to said Wilson, nor to said corporation, nor to said last-mentioned four defendants, nor any of them, any valuable or legal consideration therefor; and said defendants and said transferees

took said stock with notice of the matters stated in this clause.

FORTIETH. That the reasons why this suit is brought by the plaintiffs are that, as plaintiffs are informed and believe, the said defendants William P. Burt, Winfield S. Gilmore, Charles E. Parker, John L. Houston, W. Seward Webb, Walsingham A. Miller, Thomas L. James, or some of them, now comprise the Board of Directors of said corporation, and that it would be useless for plaintiffs to ask said Board of Directors to bring this action, as said directors, or a majority of them, are chargeable, jointly and severally, with the mismanagement of the corporation, as herein stated, in whole or in part, and that a majority of the present Board of Directors have a personal and pecuniary interest which is opposed to the interest of the corporation and all its stockholders sought to be protected by this action, and a request to said Board of Directors to sue would be an idle ceremony.

And plaintiffs further so allege that a further reason why said suit is brought by plaintiffs, is that at an annual meeting of the stockholders of said defendant corporation, which said defendant William P. Burt attended, holding proxies representing over 12,000 shares of the stock of said company, a resolution was passed against objection on the part of the plaintiffs, or their agents who represented over 1,500 shares of said stock, to amend the by-laws of said defendant corporation, so that an Executive Committee of said directors, to be elected by the Board of Directors, should have power to transact any and all of the business of the corporation, and perform such other and further duties as the board may prescribe, and receive compensation therefor. And, as plaintiffs are informed and believe, thereafter said board elected said defend-

ants William P. Burt, Winfield S. Gilmore and Charles 89
E. Parker such committee, giving said committee practically full control of said defendant corporation.

FORTY-FIRST. Plaintiffs further allege that the said individual defendants, except W. Seward Webb, Thomas L. James, William J. Arkell and Frederick B. Mitchell, as president, directors, treasurer and secretary of the said corporation, have neglected their duty of keeping full and true accounts and records of 90
the proceedings and transactions of said corporation, and of their own proceedings and transaction as its directors and officers, and, on the contrary, they or some of them have kept, or suffered to be kept, accounts and records which are incomplete, imperfect, erroneous and misleading; that in particular, as plaintiffs are informed and believe, the defendants William P. Burt and Winfield S. Gilmore, or one of them, in order to procure the transfer of treasury stock 91
to said defendant William P. Burt, mentioned in paragraph eighteen of this complaint, presented a resolution that said Burt be authorized to purchase from the company one hundred shares of full-paid common stock at $50 per share, and after said resolution had received the vote of those present, caused or suffered the same to be entered in the minutes of the board as authorizing the purchase of five hundred shares, or permitted the entry of the resolution relating to one hundred 92
shares to be altered so as to read five hundred; and that said Burt thereafter, under color of said supposed resolution allowing the purchase of five hundred shares, took that number of shares from the treasurer without accounting to the company for more than about $50 a share.

Wherefore, plaintiffs demand judgment as follows:

93 1. That the sale of said 270 shares of preferred stock and of 214 shares of the common stock of said defendant corporation to said defendant William F. Cochran, as hereinbefore set forth, be declared and adjudged by this Court to have been without authority; and that said defendants William F. Cochran, William P. Burt, Winfield S. Gilmore and Irving Ingraham be ordered and directed forthwith to pay into the treasury of said defendant The Burt Switch Company the difference
94 between the price so paid, as aforesaid, and the price originally fixed by the Board of Directors thereof as the sale value of said stock, with interest on said difference from the date or dates fixed for the payment of said purchase price, as herein set forth.

2. That in the sale of 500 shares of the common stock of said defendant corporation to said defendant William P. Burt, as hereinabove set forth, the fixing of the price at $50 per share instead of par be declared
95 and adjudged by this Court to have been without authority; and that said defendants William P. Burt, William F. Cochran and Winfield S. Gilmore be ordered and directed forthwith to pay into the treasury of the said defendant The Burt Switch Company the difference between said purchase price of $50 per share and the price originally fixed by the Board of Directors as the sale value of said stock, with interest on said difference from the date or dates fixed for the
96 payment of the purchase price, as hereinafter set forth.

3. That the Court order, adjudge and decree that the defendants William P. Burt, Winfield S. Gilmore, S. Marsh Young, William F. Cochran, Irving Ingraham, Charles E. Parker and John L. Houston shall make discovery and account before or under the direction of this Court for their transactions, acts and neglects in respect to matters and transactions set

forth in the 25th, 26th and 27th clauses or paragraphs 97
of this complaint, relating to the sale of 2,000 shares of the common stock of said defendant The Burt Switch Company, and that said last-mentioned defendants, or such of them as were concerned in said transactions, be ordered and directed to pay forthwith into the treasury of said defendant company, and account for all moneys and profits which they, or any of them, may have received or derived therefrom, and that they also pay into said treasury such sum or 98
sums as may be found on such accounting to have been lost, wasted, misapplied or diverted from the purpose for which said sum or sums were contributed by reason of the said transactions set forth in said last-mentioned clauses or paragraphs in this complaint.

4. That this Court order, adjudge and decree that the transfer of 3,000 shares of the common stock of said defendant corporation to Adoniram J. Wilson, as 99
set forth in the 28th and 29th clauses or paragraphs of this complaint, be declared to be without authority or to be illegal and void, and that the defendants William P. Burt, Charles E. Parker, Winfield S. Gilmore, and such other directors as may have assented thereto, and any of the other defendants herein who may have profited thereby, in whole or in part, may be ordered and directed to forthwith transfer and deliver to said defendant The Burt Switch Company any and every part of said last-mentioned 3,000 100
shares which may now be held by them or either of them, and that said defendants William P. Burt, Charles E. Parker and Winfield S. Gilmore be ordered and directed by this Court forthwith to pay into the treasury of said defendant corporation the full value of such shares as may not be so transferred to said defendant corporation, and that said other defendants

who may have so profited thereby be ordered and directed by this Court to forthwith pay into the treasury of said defendant corporation the full value of such part of said 3,000 shares as they may have taken directly or indirectly, and with interest thereon from the date of the transfer of said stock to Adoniram J. Wilson, or to said directors or defendants, or any of them.

5. That this Court order, adjudge and decree that the act of the directors on or about May 4th, 1894, in attempting to increase the salary of the defendant William P. Burt, as set forth in the 30th clause or paragraph of this complaint, be declared and adjudged to be void and illegal, and that the defendants William P. Burt, Winfield S. Gilmore, Charles E. Parker and Walsingham A. Miller, or such of the last-mentioned three defendants as may have voted in favor of said attempt, or may have assented thereto, may be ordered and directed to pay into the treasury of said defendant corporation the difference between the sum or sums which said defendant William P. Burt may have from time to time drawn as his salary, and the sum or sums which he was legally entitled to take and receive, with interest thereon.

6. That this Court order, adjudge and decree that all the individual defendants be ordered and directed to make discovery and to account before or under the direction of this Court for their transactions, acts and neglects in respect to the affairs of said defendant corporation, and to repay to the treasurer thereof such sums as they may have wrongfully taken therefrom or intercepted or diverted to their own personal account, or converted to their own use, and make good to said treasury the losses which they have caused, and that for that purpose produce their private books

and papers, and the books and papers under their control which belong to said defendant corporation. 105

7. That this court order, adjudge and decree that said defendants, and each of them, shall be enjoined from giving away or selling for inadequate or illegal consideration any of the goods, property or capital stock of said corporation, and from wasting any part thereof, and from transferring any of the said stock now or at any time held by said defendants, or by any one in their behalf, which has been issued for an inadequate or illegal consideration, and that said defendants, and each of them, individually and as directors, be enjoined from disposing of or paying out any of the said corporation funds by way of gratuities, gifts, or in any other manner than in the ordinary course of transacting the business for which said defendant corporation was organized. 106

8. That until the further order of the Court, defendants William P. Burt, Winfield S. Gilmore and Charles E. Parker be enjoined from assuming to exercise in the capacity of executive committee or as members thereof any of the powers conferred by law upon the Board of Directors of said corporation. 107

9. That all of the individual defendants herein be enjoined until the further order of the Court from voting at any stockholders' meeting of said corporation upon stock transferred from the treasury of said company, as alleged in paragraphs 10, 13, 14, 18 and 28 of this complaint, and that said John Doe and Richard Roe and all other persons who may be holders of such stock, or stock issued or transferred from the treasury in any similar manner in fraud of the rights of the company, and who do not hold it as purchasers for value without notice, be also enjoined 108

from voting on said stock at any meeting of the stockholders of said corporation; and that said corporation, its officers, agents and servants be enjoined from receiving at any election, or upon any resolution or other proceeding at any stockholders' meeting of said corporation, any vote offered in respect of any stock transferred from the treasury of the corporation without due authority, as hereinbefore stated or otherwise, unless held by purchasers in good faith and for value, or persons claiming under such purchasers.

10. That the said corporation defendant and its transfer agent be enjoined from transferring on the books of the company any stock of said company when asked for upon a presentation of certificates issued under the transactions mentioned in paragraphs 10, 13, 14, 18 and 28 of the complaint, if presented for transfer by or on behalf of any of the defendants in this action, or by or on behalf of any purchaser, transferee, attorney or agent claiming under such defendants, or any of them, unless it be by a transfer by such defendant given previous to the commencement of this action, to-wit, the 20th day of November, 1894.

11. That this court order, adjudge and decree that if, on the making of the discovery and the statement of the account hereby sought, it shall appear to be to the advantage of the stockholders of said corporation so to do, that a Receiver be appointed for the goods, property and franchises and all the concerns of said defendant corporation, or all thereof within this State, and that said plaintiffs may have such other and further relief as they may be entitled to in the premises, together with costs in this action.

JOHN HEPBURN,
Plaintiff's Attorney,
No. 1 Broadway, N. Y. City.

CITY AND COUNTY OF NEW YORK, ss. : 113

JOHN HEPPURN, being duly sworn, says that he is the attorney herein of Abbie S. Shaw and Emma S. Shaw, two of the plaintiffs in this action, and resides in the City and County of New York; that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Deponent further says that the 114
grounds of his belief as to all matters therein stated upon his knowledge, are as follows: That he has possession of the certificates of the stock issued by said defendant corporation to said two plaintiffs; and, also, of letters from said defendants, or some of them, admitting the truth of certain allegations alleged in the complaint; and, also, of copies of parts of the books purporting to be the books of record of said defendant corporation.

Deponent further says that the reason why this ver- 115
ification is not made by said plaintiffs is that said plaintiffs are, and each of them is, not within the said County of New York.

JOHN HEPBURN.

Sworn to before me this 20th day of November, 1894.

HENRY L. SMITH,
Notary Public,
Kings Co., N. Y. 116
Cert. filed in N. Y. Co.

117 CITY AND COUNTY OF NEW YORK, SS.:

CHARLES F. ULRICH, being duly sworn, says that he is one of the above-named plaintiffs; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

C. F. ULRICH.

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Sworn to before me this 20th day of November, 1894.

HENRY L. SMITH,
Notary Public,
Kings Co., N. Y.
Cert. filed in N. Y. Co.

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120

SUPREME COURT. 121

NEW YORK COUNTY.

ABBIE S. SHAW, ET AL,

against

WILLIAM P. BURT, ET AL. 122

The defendant The Burt Switch Company, by Jesse S. Robertson, its counsel, demurs to the complaint herein:

FIRST. For that the Court has no jurisdiction of the subject of the action. 123

SECOND. For that the complaint does not state facts sufficient to constitute a cause of action.

THIRD. That the Court has no jurisdiction of this defendant.

FOURTH. 1. For that causes of action have been improperly united, in that a cause of action in equity against this defendant has been joined with causes of action at law against the other defendants or some of 124 them, to-wit, in paragraphs 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 17th, 18th, 19th, 22d, 23d, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, 36th, 37th and 38th, there is attempted to be set out an alleged cause of action against this defendant for the issue of stock, for the purchase of stock, franchises and property of another corpora-

125 tion, and for wasting, or allowing to be wasted, the money and other property of this corporation, and with prayer that said stock, property and money be recovered for the purposes and benefit of the corporation, which is in the nature of a cause of action in equity against the corporation; while in paragraphs 5th, 15th, 20th, 21st, 39th, 40th and 41st taken in connection with the allegations in paragraph 10th to the effect that defendants Burt, Cochran, Gilmore and
126 Ingraham voted for a resolution as if a valid act of the corporation, and that Cochran took and now holds two hundred and seventy shares of the preferred and two hundred and fourteen shares of the common stock as his own; and the allegations in paragraphs 16th and 17th that defendant Mitchell made certain false representations; and the allegations in paragraph 18th that the defendants Cochran, Gilmore and Burt pretended to make a certain resolution when there was not a sufficient number of directors to constitute a quorum;
127 and the allegations in paragraph 28th that the defendants Burt, Parker and Gilmore assumed to pass a resolution to transfer three thousand shares of the common stock of the corporation to A. J. Wilson, it not being a valid act of said corporation; and the allegation in paragraph 29th that the defendants Burt and Gilmore by a device and pretext wrongfully obtained said three thousand shares to be disposed of at their own pleasure, which they did; there is attempted
128 to be set out a cause of action at law sounding in tort against the above-named defendants, other than the corporation, resulting in damages.

And 2, in that the causes of action stated in the complaint do not affect all the parties to the action, to-wit, that in paragraph 10th the defendants Burt, Cochran, Gilmore and Ingraham are alleged to have acted upon the resolution for the sale of two hundred

and seventy shares of the preferred stock and two 129
hundred and fourteen shares of the common stock to said Cochran, in which action none of the other individual defendants is alleged to have participated; and in paragraph 13th defendants Cochran, Ingraham, Gilmore and Burt are alleged to have acted upon the resolution to sell not to exceed two hundred shares at not less than ninety dollars, in which no other of individual defendants are alleged to have participated; and in paragraph 14th defendants Cochran, Gilmore 130
and Burt are alleged to have acted upon a resolution to give an option to purchase treasury stock, in which action no other of the individual defendants is alleged to have participated; and in paragraph 18th the defendants Cochran, Gilmore and Burt are alleged to have acted, or pretended to have acted, in the passage of a resolution authorizing said Burt to purchase five hundred shares of full paid common stock at fifty dollars per share, in which action none of the other 131
defendants is alleged to have participated; and in paragraph 29th the same defendants are alleged to have voted to sell treasury stock to themselves or friends at fifty dollars per share, while they were selling stock held by themselves as individuals at ninety dollars per share and upwards, in which action none of the other defendants is alleged to have participated; and in paragraph 28th defendants Burt, Parker and Gilmore are alleged to have acted in the pretended passage of a resolution to transfer three thousand 132
shares of the full paid common stock of the company to A. J. Wilson, in payment for certain patents and appliances, which resolution is alleged to have been invalid, and in which none other of the individual defendants is alleged to have participated; and in paragraph 39th it is alleged that the defendant Webb received a thousand shares of stock, and the defendant

133 Arkell received two thousand shares of stock; that afterward one Robeson received a hundred shares of stock from Arkell, and one Daniels received fifty shares of stock from Arkell, all without consideration, and with knowledge that the same had been issued by the corporation without valuable or legal consideration therefor, in none of which acts is any of the other individual defendants alleged to have participated, and no one of said defendants Webb, Arkell is alleged to
134 have participated in, or have had any knowledge of, any other of the transactions set forth in the complaint as having been participated in by the other individual defendants, or any of them.

And, 3d, in that some of the defendants have no interest in, and are not attempted to be affected by, some of the causes of action alleged in the complaint, to-wit, that defendants Webb and Arkell are not alleged to have any interest in, and are not attempted to be
135 affected by, any of the acts of Burt, Cochran, Gilmore and Ingraham set out in paragraph 10th; nor of Cochran, Ingraham, Hollister, Gilmore and Burt set out in paragraph 13th; nor of Cochran, Gilmore, Young and Burt set out in paragraphs 16th and 17th; nor of Cochran, Gilmore and Burt set out in paragraphs 18th, 20th and 23d; to-wit, defendant Miller is not alleged to have any interest in, and is not attempted to be affected by the acts or causes of action alleged against defendants Burt, Cochran, Gilmore
136 and Ingraham in paragraph 10th, nor of Ingraham, Burt, Cochran and Gilmore set out in paragraph 13th, nor of Burt, Cochran, Gilmore, Mitchell and Young set out in paragraphs 16th and 17th, nor of Burt, Cochran and Gilmore set out in paragraphs 18th, 20th and 23d; to-wit, defendant Parker is not alleged to have any interest in, and is not attempted to be affected by, the acts or causes of action alleged against the de-

fendants Burt, Cochran, Gilmore and Ingraham in 137
paragraph 10th, nor of Ingraham, Hollister, Burt, Cochran and Gilmore set out in paragraph 13th, nor of Burt, Cochran, Gilmore and Young set out in paragraphs 16th and 17th, nor of Burt, Cochran and Gilmore set out in paragraphs 18th, 20th and 23d; to-wit, defendant Ingraham is not alleged to have any interest in, and is not attempted to be affected by, the acts or causes of action alleged against defendants Burt, Cochran, Gilmore and Young set out in paragraphs 16th 138
and 17th, nor of Burt, Cochran and Gilmore set out in paragraphs 18th, 20th and 23d, and against Burt, Parker and Gilmore set out in paragraph 25th, nor of Webb or Arkell set out in paragraph 39th; to-wit, defendant Mitchell is not alleged to have any interest in, and is not attempted to be affected by, the acts or causes of action alleged against defendants Burt, Cochran, Gilmore and Ingraham set out in paragraph 10th, nor of Cochran, Ingraham, Gilmore and Burt set out 139
in paragraph 13th, nor of Cochran, Gilmore and Burt in paragraph 14th, nor of Burt, Cochran, Gilmore and Young set out in paragraphs 16 and 17; nor of Burt, Cochran and Gilmore, set out in paragraphs 18, 20 and 23; nor of Burt, Parker and Gilmore, set out in paragraphs 28 and 29; nor of Parker, Miller, Gilmore and Burt, set out in paragraph 30th; nor of Burt, Gilmore and Cochran, set out in paragraph 38; nor of Webb and Arkell, set out in paragraph 39; to-wit, 140
defendants Webb, James, Arkell and Mitchell are not alleged to have any interest in, and are not attempted to be affected by, the acts or causes of action, and the defaults or negligences alleged against defendants Burt, Cochran, Gilmore and Ingraham, set out in paragraph 10; nor of Ingraham, Burt, Cochran and Gilmore, set out in paragraph 13; nor of Burt, Cochran, Gilmore and Young, set out in paragraphs 16 and 17; nor of

141 Burt, Cochran and Gilmore, set out in paragraphs 18, 20 and 23; nor of the corporation or its directors, as set out in paragraph 27; nor of Burt, Parker and Gilmore, as set out in paragraphs 28 and 29; nor of Parker, Miller and Gilmore, as set out in paragraph 30; nor of the corporation or its directors, officers, agents or employees in impoverishing the company and neglecting and mismanaging its affairs, as set out in paragraph 31st; nor of the corporation, its direct-
142 ors, officers, treasurer or agents in mismanaging the affairs of said corporation, and in improperly and falsely reporting its assets and property and the amount of the sales of its stock, as set out in paragraphs 33d and 34th; to-wit, that no one of the individual defendants, except William P. Burt, is alleged to have, or to have had, any interest in, and is not attempted to be affected by the wrongful act and crime alleged in paragraph 41 of the complaint to have been committed by the defendant William P. Burt in
143 altering a resolution of the Board of Directors in his own favor, after its passage, by changing the resolution from one authorizing a sale to him of one hundred shares into one authorizing a sale to him of five hundred shares, and thereafter under color of the said supposed resolution taking to himself the five hundred shares, nor are they, or any of them, alleged to have known of or to have participated in these acts.

And, 4, in that the complaint joins causes of action
144 against this defendant with others against a third person who is not a director or an officer of this defendant, in behalf of said defendant, to-wit, against Arkell, in paragraph 39th of the complaint.

FIFTH. That there is a misjoinder of parties plaintiff in that the plaintiff Charles F. Ulrich appears by the complaint to have received his stock long after

each and every of the acts and transactions set forth in the complaint and complained of had occurred, while the plaintiffs Abbie S. Shaw and Emma S. Shaw are alleged to have received their stock in 1892, when some of the transactions and acts set forth in the complaint, viz., the issue of the 3,000 shares of stock to Wilson and the transfer to Webb and Arkell, set out in paragraphs 28, 29 and 39 of the complaint, also the voting of salary to the president set out in paragraph 30, and the alleged incorrect reports and alleged wasteful acts set out in paragraphs 33 and 34, had not taken place. 145 146

J. S. ROBERTSON,
Attorney for the Defendant,
The Burt Switch Company,
Office and P. O. address, Ballston Spa, N. Y.

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148

1 NEW YORK SUPREME COURT.

COUNTY OF KINGS.

ARTLISSA V. BARNES,
Plaintiff,

against

2 HERMAN MOORE and PAULINE M. MOORE,
Defendants.

Complaint.

The above-named plaintiff complaining against above-named defendants alleges upon information and belief that on or about the 18th day of May, 1896,
3 the above-named defendants made and executed their three promissory notes in writing, each bearing said date whereby in each of said notes for value received they jointly and severally promised to pay to the order of the plaintiff the sum of twenty dollars at the office of M. Barnes, 108 Fulton Street, City of New York. That said promissory notes were respectively payable two months, three months and four months after date, and for a valuable consideration the said promissory
4 notes were on or about said 18th day of May, 1896, delivered to the plaintiff who thereupon became the owner and holder of the same. That said notes or any part thereof has not since been paid to plaintiff, and said defendants are now justly indebted to plaintiff upon said notes in the aggregate sum of sixty dollars with interest on twenty dollars thereof from July 18, 1896, interest on twenty dollars from August 18, 1896, and interest on twenty dollars from Septem-

ber 18, 1896, for which sum of sixty dollars with interest as aforesaid plaintiff demands judgment against said defendants, besides costs of this action. 5

M. BARNES,
Plaintiff's Attorney.

State of New York, } ss.
City of Brooklyn. }

ARTLISSA V. BARNES, being duly sworn, says, that the foregoing complaint is true to her own knowledge except the matters therein stated to be alleged upon her information and belief, and as to these matters she believes it to be true. 6

ARTLISSA V. BARNES.

Sworn to before me September 23rd, 1896. }

FRANK A. BARNES,
Commissioner of Deeds,
City of Brooklyn. 7

8

9 SUPREME COURT.

KINGS COUNTY.

ARTLISSA V. BARNES,

vs.

10 HERMAN MOORE and PAULINE M. MOORE.

Amended Answer.

Come the defendants and for an amended answer:

1. They deny each and every the allegations in the plaintiff's complaint herein contained.

11 2. And for a further, separate and distinct defense to plaintiff's alleged cause of action, the defendants re-alleging their denial hereinbefore set forth, further allege:

3. That in or about the month of May, 1894, the plaintiff and the defendants entered into an agreement whereby for the sum of $850 to be paid by the plaintiff to the defendants; the defendant, Pauline M. Moore, being the owner of a certain premises known
12 as No. 99 Lawrence Street, in the City of Brooklyn, agreed to pay over to such plaintiff the rents as they were collected of certain tenants in the said premises for a period of ten months and further the defendants agreed to pay to the plaintiff the sum of $20 and they agreed to give a bond and mortgage in the sum of $1,000 on said premises as collateral security for the payment of the rents as they were collected.

4. That the defendant Pauline M. Moore paid over 13
to the plaintiff the rents as agreed as they were collected, but that before the expiration of the ten months certain of the tenants whose rents were to be paid over to the plaintiff, moved out of the said premises, and the aggregate sum of the ten months' rents collected and paid over did not equal the amount paid by the plaintiff therefor; but that the defendants fulfilled their agreement and paid over to the plaintiff all the rents as they collected them from the tenants 14
whose rents the defendant Pauline M. Moore agreed to pay to the plaintiff.

5. That believing it necessary that the amount of rents collected and paid over to the plaintiff under the said agreement should equal the amount paid by the plaintiff for them, the defendants paid to the plaintiff the sum of $120, being rents collected from such tenants aforesaid after the expiration of the above stated term of ten months, besides paying to the 15
plaintiff the sum of $42, and the sum thus paid under mistake of fact equalled the sum of $162. That there was still a difference of $60 between the amount paid for the said rents by the plaintiff and the amount paid by the defendants for the rents as they were collected and the amount of $162 paid as herein set forth. That the defendants believing it necessary that the plaintiff should be paid this said sum of $60 under mistake of fact gave to such plaintiff three cer- 16
tain paper writings in the form of promissory notes, each purporting to be promises by the defendants to pay to the plaintiff at the times mentioned by the plaintiff in her complaint the sum of $20, but that the said paper writings were given under mistake of fact and wholly without consideration.

And for a further, separate and distinct defense and

as a counterclaim to the plaintiff's alleged cause of action, the defendants re-alleging the admissions and denials and the facts hereinbefore set forth, allege:

6. That they wholly performed their agreement when they paid to the plaintiff the rents as collected as aforesaid. That the said sum of $162 paid as aforesaid to the plaintiffs by the defendants, was so paid under mistake of fact and wholly without consideration, and that the said sum of $162, is due and owing the defendants by the plaintiff; that due demand for its payment has been made by the defendants, but the plaintiff refuses and neglects to pay the same or any part thereof.

Wherefore the defendants ask judgment that the complaint herein be dismissed and for judgment against the plaintiff in the sum of $162, with costs.

A. M. JENKINS,
Attorney for Defendants,
189 Montague Street,
Brooklyn, N. Y.

City of Brooklyn, } ss.
County of Kings. }

HERMAN MOORE, being duly sworn, deposes and says, that he is one of the defendants in this action, that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HERMAN MOORE.

Sworn to before me this 14th day of December, 1896.

SAMUEL KLEIN,
Com. of Deeds,
City of Brooklyn, N. Y.

N. Y. SUPREME COURT, 21

KINGS COUNTY.

ARTLISSA V. BARNES,
Plaintiff,

against

HERMAN MOORE and PAULINE M. MOORE.
Defendants.

} Amended Reply. 22

(1.) The plaintiff for an amended reply to the counterclaim set up by defendants amended answer to the claim set forth in the complaint alleges, she has no knowledge or information sufficient to form a belief, and therefore denies each and every allegation in said amended answer constituting a counterclaim 23 except as hereinafter admitted.

(2.) Plaintiff for a further amended reply to the said counterclaim alleges, upon information and belief, that on or about April 23, 1894, the defendant Herman Moore in consideration of the sum of $850 paid to him by plaintiff, sold and assigned to plaintiff by an instrument in writing executed by him, certain rents amounting to $980, and which were 24 to become due to said defendant Herman Moore, from the occupants of six tenements in building known as 99 Lawrence Street, City of Brooklyn, for ten consecutive months, commencing with the month of June, 1894, and being the sum of $98, for each of said ten months, the said defendant Herman Moore further agreeing by terms of said instrument of assignment to collect said $98, each and every of said

25 months from said tenants and pay the same to plaintiff, and that if for any cause, whether by removal from said tenements or otherwise, the said tenants or any of them failed to pay said rents in advance on the first day of each of said months, then the said defendant Herman Moore was to make up such deficiency, and pay to plaintiff on or before the 10th day of each of said months, the said sum or rental of $98.

26 (3.) Plaintiff for a further amended reply to said counterclaim alleges, upon information and belief, that simultaneously with the execution of said instrument of assignment, the said defendants executed under their hands and seals, their bond with a mortgage upon said premises, 99 Lawrence Street, as collateral security, conditioned for the payment to plaintiff of $98 on the 10th day of June, 1894, and $98 on the 10th day of each month thereafter, until
27 said $980 was fully paid, and thereupon said instrument of assignment with said bond and mortgage were delivered to plaintiff.

(4.) Plaintiff for a further amended reply to said counterclaim, alleges upon information and belief, that said bond and mortgage were delivered by defendants to plaintiff to secure the collection and payment of said rents by defendant Herman Moore as aforesaid, to plaintiff.

28

(5.) Plaintiff for a further amended reply to said counterclaim, alleges upon information and belief, that defendant Herman Moore paid on account of said rents, the sum of $776, and leaving due and unpaid to plaintiff of said rents the sum of $204.

(6.) Plaintiff for a further amended reply to said counterclaim, alleges upon information and belief,

that an action was commenced by plaintiff upon said 29
bond against defendants for said sum of $204, and a summons was issued by John C. Rhodes, Esq., a Justice of the Peace at Bath Beach, in the City of Brooklyn, and a copy of said summons was served personally upon each of said defendants on the 12th day of May, 1896, and which said summons was returnable before said Justice of the Peace on May 21, 1896. That on or about the 18th day of May, 1896, the said suit and cause of action aforesaid was com- 30
promised and settled and suit discontinued upon the payment to plaintiff of $20 in cash and a delivery to plaintiff of four promissory notes executed by defendants to plaintiff for the sum of $20 each, three of said promissory notes being the same mentioned and described in the complaint herein, and thereupon plaintiff delivered to defendants her certificate duly acknowledged whereby she certified that the said bond and mortgage were fully paid and satisfied.

M. BARNES, 31
Plaintiff's Attorney.

State of New York, }
City of Brooklyn, } ss.
County of Kings. }

ARTLISSA V. BARNES, being duly sworn, says she has heard read the foregoing amended reply, and knows the contents thereof. That the same is true to her own knowledge except the matters therein stated to be alleged upon her information and belief; 32
and that as to those matters she believes it to be true.

ARTLISSA V. BARNES.

Sworn to before me }
January 19, 1897. }
FRANK A. BARNES,
Commissioner of Deeds,
City of Brooklyn.

33 SUPREME COURT.

KINGS COUNTY.

ARTLISSA V. BARNES,

vs.

HERMAN MOORE and PAULINE M. MOORE. 34

} Demurrer.

The defendants demur to the reply of the plaintiff on the ground that it is insufficient in law, upon the face thereof.

Dated February 8th, 1897.

A. M. JENKINS,
Attorney for Defendants,
189 Montague Street,
Brooklyn, N. Y. 35

36

SUPREME COURT. 1

NEW YORK COUNTY.

SUSANNA BURKE, as Administratrix of the goods, chattels and credits of PATRICK J. BURKE, deceased,

Plaintiff, 2

against

THE METROPOLITAN RAILROAD COMPANY,

Defendant.

The plaintiff complaining of the defendant herein by Sheldon Montgomery, her attorney, respectfully 3 shows to the Court as follows:

FIRST. Upon information and belief, that at all the times herein mentioned the defendant was and now is a domestic corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and at all the times herein mentioned operated a surface street railroad on and along Fourth avenue, a public street in the city and county of New 4 York, and moved and propelled cars thereon as a common carrier of passengers for hire.

SECOND. That on or about the 11th day of October, 1895, Patrick J. Burke, then a resident of the city and county of New York, died intestate, and that thereafter and on or about the 30th day of December, 1895, letters of administration upon the estate of said de-

5 ceased were duly issued to the plaintiff by the Surrogate of the city and county of New York, and that the plaintiff has duly qualified and is now acting as such Administratrix.

THIRD. That on or about the 6th day of October, 1895, the plaintiff's intestate boarded and got upon the car, paid the fare and became a passenger of the defendant on its line of railway on said Fourth avenue near the intersection of 53d street, to be transferred
6 downtown and in a southerly direction in said city. That when the said car carrying the plaintiff's intestate had approached and was rapidly passing along on said line of railway a little below the intersection of 44th street and said Fourth avenue, the defendant, its servant or employe, suddenly, violently and negligently, and without notice to plaintiff's intestate, applied the brake on said car and brought the car to a sudden and violent stop, throwing the plaintiff's in-
7 testate down, off and from said car and under the said car, and the plaintiff's intestate was dragged by said car and one of the wheels of said car was caused to run over the plaintiff's intestate's left leg, whereby plaintiff's intestate was so bruised, crushed and injured that he died at the time aforesaid.

FOURTH. That the death of the said Patrick J. Burke was caused solely through the carelessness and negli-
8 gence of the defendant, its servant or employe and without any negligence or fault on the part of the plaintiff's intestate in any way contributing thereto.

FIFTH. That the said Patrick J. Burke left him surviving his widow, Susanna Burke, the plaintiff, and a child.

SIXTH. That by reason of the premises, the plaintiff, as Administratrix as aforesaid, has sustained

damages and is entitled to recover the sum of twenty- 9
five thousand dollars ($25,000) damages from the defendant, with interest thereon from the 11th day of October, 1895.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars ($25,000) damages, with interest from the 11th day of October, 1895, besides the cost of this action.

10

SHELDON MONTGOMERY,
Plaintiff's Attorney,
No. 15 Wall Street,
New York City.
New York.

City and County of New York, ss.:

SUSANNA BURKE, being duly sworn, says that she is the plaintiff in the above entitled action; that she 11
has read the foregoing complaint and knows the contents thereof and that it is true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

(Signed) SUSANNA BURKE.

Sworn to before me this 8th day of January, 1896.

(Signed) JOHN J. FITZGERALD, 12
Notary Public,
New York County.

13 SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

SUSANNA BURKE, as Administratrix of the goods, chattels and credits of PATRICK J. BURKE, deceased,

Plaintiff,

14 against

THE METROPOLITAN RAILROAD COMPANY,

Defendant.

Defendant answering the complaint of the plaintiff herein alleges:

I.—Defendant denies that it has any knowledge or
15 information thereof sufficient to form a belief as to each and every of the allegations contained in the paragraphs of said complaint which are therein numbered "Second" and "Fifth."

II.—Defendant denies on information and belief each and every of the allegations contained in the paragraph of the said complaint which is therein numbered "Third," commencing with the words "that when the said car carrying the plaintiff's intestate"
16 and each and every of the allegations contained in the paragraphs of the said complaint which are therein numbered "Fourth" and "Sixth."

And defendant, further answering said complaint, alleges that the alleged injuries, if any such happened, happened solely by and through the negligence of the plaintiff's intestate and without any negligence or fault of this defendant.

Wherefore, defendant demands judgment that the 17
complaint herein be dismissed with costs.

JOHNSON & MILLER,
Attorneys for Defendants,
111 Broadway,
New York City.

City and County of New York, ss.:

JOHN B. OVERTURF, being duly sworn, says that
he is the Secretary of the Metropolitan Railroad Com- 18
pany, the defendant herein, that he has read the fore-
going answer and knows the contents thereof, and
that the same is true to his knowledge except as to
the matters therein stated to be alleged on informa-
tion and belief, and as to those matters he believes it
to be true.

(Signed) JOHN B. OVERTURF.

Sworn to before me this 21st
day of January, 1896. 19

(Signed) DAVID E. BABCOCK,
Commissioner of Deeds,
New York City.

20

21 SUPREME COURT.

NEW YORK COUNTY.

SUSANNA BURKE, as Administratrix of the goods, chattels and credits of PATRICK J. BURKE, deceased,

Plaintiff,

22 against

THE METROPOLITAN RAILROAD COMPANY,

Defendant.

The plaintiff, by this her amended complaint, complaining of the defendant herein by Sheldon Montgomery, her attorney, respectfully shows to the Court
23 as follows:

FIRST.—Upon information and belief, that at all the times herein mentioned the defendant was and now is a domestic corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and at all the times herein mentioned operated a surface street railroad on and along Fourth avenue, a public street in the City and County of New York, and moved and propelled cars thereon
24 as a common carrier of passengers for hire.

SECOND.—That on or about the 11th day of October, 1895, Patrick J. Burke, then resident of the City and County of New York, died intestate, and that thereafter and on or about the 30th day of December, 1895, letters of administration upon the estate of the said deceased were duly issued to the plain-

tiff by the Surrogate of the City and County of New 25
York, and that the plaintiff has duly qualified and is now acting as such administratrix.

THIRD.—That on or about the 6th day of October, 1895, the plaintiff's intestate boarded and got upon the front platform of one of the defendant's street cars and paid the fare and became a passenger of the defendant on its line of railway on said Fourth Avenue, near the intersection of 53d Street, to be transferred 26
downtown and in a southerly direction in said city. That when the said car carrying the plaintiff's intestate had approached and was rapidly passing along on said line of railway a little below the intersection of 44th Street and said Fourth avenue, the defendant, its servant or employe, suddenly, violently and negligently, and without notice to the plaintiff's intestate, applied the brake on said car and brought the car to a sudden and violent stop, thereby throwing the plaintiff's intestate down, off and from the said platform of 27
said car and under the said car, and the plaintiff's intestate was dragged by said car, and one of the wheels of said car was caused to run over the plaintiff's intestate's left leg, whereby plaintiff's intestate was so bruised, crushed and injured that he died at the time aforesaid.

FOURTH.—Upon information and belief that at all the times herein mentioned the defendant Company 28
had a rule, regulation and custom whereby its agents and servants directed and permitted passengers that were smoking to stand upon the front platform of its closed cars, and that smoking elsewhere upon its said closed street cars was and is prohibited.

FIFTH.—That the death of the said Patrick J. Burke was caused solely through the carelessness and

negligence of the defendant, its servant or employee, and without any negligence or fault on the part of the plaintiff's intestate in any way contributing thereto.

SIXTH.—That the said Patrick J. Burke left him surviving his widow, Susanna Burke, the plaintiff, and a child, since deceased.

SEVENTH.—That by reason of the premises the plaintiff, as administratrix, as aforesaid, has sustained damages and is entitled to recover the sum of Twenty-five thousand Dollars ($25,000) damages from the defendant, with interest thereon from the 11th day of October, 1895.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Twenty-five thousand Dollars ($25,000) damages, with interest from the 11th day of October, 1895, besides the costs of this action.

SHELDON MONTGOMERY,
Plaintiff's Attorney,
No. 15 Wall Street,
N. Y. City, N. Y.

City and County of New York, ss.:

SUSANNA BURKE, being duly sworn, says: That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, and that it is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

(Signed) SUSANNA BURKE.

Sworn to before me this 15th day of February, 1896.

(Signed) MAX BERNHEIM,
Notary Public,
New York Co.

SUPREME COURT. 33

CITY AND COUNTY OF NEW YORK.

SUSANNA BURKE, as Administratrix of the goods, chattels and credits of PATRICK J. BURKE, deceased,

Plaintiff,

against 34

METROPOLITAN RAILROAD COMPANY,

Defendant.

SIR:

Please take notice that upon all the pleadings and proceedings herein we will move this Court at a Special Term, Part I., to be held at the County Court House in the City of New York upon the 6th day of 35
March, 1896, at the opening of the Court on that day or as soon thereafter as counsel can be heard for an order striking out as irrelevant the words in paragraph "Three" of the amended complaint herein "front platform of one of the defendant's street" and "platform of said," and also striking out as irrelevant the whole of paragraph "Four" of said amended complaint, and for the costs of this motion.

Dated New York, February 27th, 1896. 36

Yours &c.,

JOHNSON & MILLER,
Attorneys for Defendant,
111 Broadway,
New York City.

To SHELDON MONTGOMERY, Esq.
Attorney for Plaintiff,
No. 15 Wall Street, New York City.

1 SUPREME COURT.—ONEIDA COUNTY.

JAMES H. DAVIDSON, as trustee of and under the last will of ABIJAH J. DAVIDSON, deceased, for JANE M. B. HEATH,
Plaintiff,

against

2

UTICA FABRIC COMPANY,
Defendant.

} Complaint.

Plaintiff complains of defendant and shows to the court that at the times hereinafter stated, plaintiff was, and still is, trustee of and under the last will of Abijah J. Davidson, deceased, for Jane M. B. Heath,
3 which said will was duly proved and admitted to probate by the Surrogate of the county of Oneida and State of New York, long prior to the giving of the note hereafter mentioned.

Plaintiff further alleges that at the times hereinafter stated defendant was, and still is, a domestic corporation, organized and existing under and by virtue of
4 the laws of the State of New York.

Plaintiff further alleges that said defendant heretofore, for value received, made and delivered to the plaintiff, as such trustee, its promissory note, in writing, of which the following is a copy:

"$4,635.00. New York, July 1st, 1895.

Six months after date, we promise to pay to the order of James H. Davidson, Trustee, Four Thousand

Six Hundred and Thirty-five and $\frac{00}{100}$ Dollars, at 5
Oneida National Bank, Utica, N. Y. Value received.

UTICA FABRIC CO.
G. W. DAVIDSON,
President.

Countersigned,
R. A. C. SMITH,
Treasurer."

Plaintiff further alleges that no part of said promissory note has been paid, and that there is due and owing the plaintiff, as such trustee as aforesaid, by 6
reason of the facts aforesaid, the sum of $4,635.00, with interest thereon from the first day of January, 1896, for which sum plaintiff demands judgment, besides costs.

BARTLETT, HOLT & WHITE,
Plaintiff's Attorneys,
30 Genesee Street, Utica, N. Y.

STATE OF NEW YORK, } *ss.*
COUNTY OF ONEIDA, }

D. Clinton Murray being duly sworn, deposes and 7
says that he is the agent and attorney in fact of the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason this verification is made by deponent and not by plaintiff is because all the material allegations of said complaint are within the 8
personal knowledge of deponent.

D. CLINTON MURRAY.

Sworn to before me this }
January 2d, 1896. }

A. J. BAECHLE,
Notary Pubtic,
Oneida Co., N. Y.

Original filed Feb'y 4, 1896.

9 SUPREME COURT—ONEIDA COUNTY.

JAMES H. DAVIDSON, as trustee of and under the last will of ABIJAH J. DAVIDSON, deceased, for JANE M. B. HEATH,

against

UTICA FABRIC COMPANY.

10

Answer.

The defendant appearing by Thornton & Carothers, its attorneys, and answering the complaint in the above entitled action, respectfully shows to the court:

That the plaintiff, James H. Davidson, is now, was at the time this action was commenced, and had been for more than a year last past of unsound mind, and
11 totally and utterly incapable of understanding or transacting any business whatever, and is utterly incapable of maintaining this action, and was so at the time it was brought.

That, as defendant is informed and verily believes, D. Clinton Murray, the person who appears to have verified the complaint, was not at the time he verified said complaint, could not be and never was the agent
12 or attorney in fact for the plaintiff, and that at the time of the pretended appointment of said Murray as the attorney in fact of the plaintiff, and at the time of the pretended appointment of the said Murray as the agent of the plaintiff the said James H. Davidson was and ever since has been of unsound mind and without any understanding whatever.

Wherefore, the defendant demands judgment dis-

missing the complaint with costs, or such other, 13
further or different relief as to the court may seem
just.

THORNTON & CAROTHERS,
Attorneys for Defendant,
79 Genesee Street, Utica, N. Y.

STATE OF NEW YORK, }
COUNTY OF ONEIDA. } *ss.*

G. W. Davidson, being duly sworn, deposes and
says: That he is the president of the defendant, which 14
is a domestic business corporation, and resides in the
city of Utica; that he is a nephew of the James H.
Davidson mentioned in the summons and complaint
and has seen him from time to time during the last
ten years and is well acquainted with the mental con-
dition of said James H. Davidson; that he has read
the foregoing answer and knows the contents thereof
and that the same is true to the knowledge of deponent
except as to the matters therein stated to be alleged 15
on information and belief, and that as to those mat-
ters he believes it to be true.

G. W. DAVIDSON.

Subscribed and sworn to before me }
this 28th day of January, 1896. }

W. K. HARVEY,
Notary Public,
Oneida County, N. Y.

16

17 SUPREME COURT—ONEIDA COUNTY.

JAMES H. DAVIDSON, as trustee of and under the last will of ABIJAH J. DAVIDSON, deceased, for JANE M. B. HEATH, against UTICA FABRIC COMPANY.	Affidavit of P. C. J. Carothers.

18

STATE OF NEW YORK, } *ss.*
COUNTY OF ONEIDA. }

P. C. J. Carothers, being duly sworn, says: That he is one of the attorneys for defendant in the above entitled action, and that defendant intends to serve the annexed answer. That defendant desires an order for the trial of the issues herein, pursuant to Section 1778 of the Code of Civil Procedure, and that no previous application for such order has been made.

19

P. C. J. CAROTHERS.

Subscribed and sworn to before me this 28th day of January, 1896.

W. K. HARVEY,
Notary Public,
Oneida Co., N. Y.

20

SUPREME COURT—ONEIDA COUNTY. 21

JAMES H. DAVIDSON, as trustee of and under the last will of ABIJAH J. DAVIDSON, deceased, for JANE M. B. HEATH, against UTICA FABRIC COMPANY.	Order for trial of Issues.

22

Upon the complaint herein and upon the annexed answer of the defendant and affidavit of P. C. J. Carothers, one of the defendant's attorneys, and upon motion of Thornton & Carothers, attorneys for the defendant, it is

Ordered, that the issues presented by said complaint and answer be tried. 23

Dated January 28th, 1896.

W. T. DUNMORE,
Oneida Co. Judge.

24

1 SUPREME COURT,

NEW YORK COUNTY.

THE MANHATTAN ELEVATED RAILWAY COMPANY,
Plaintiff,

against

LOUIS F. MARCUS, as Commissioner of Street Improvements
2 of the 23d and 24th Wards of the City of New York,

and

WILLIAM L. STRONG, Mayor of the City of New York; ASHBEL P. FITCH, Comptroller of the City of New York; WILLIAM BROOKFIELD, Commissioner of Public Works of the City of
3 New York; DAVID H. KING, JR., President of the Department of Public Parks of the City of New York; JOHN JEROLOMAN, President of the Board of Aldermen of the City of New York, and LOUIS F. MARCUS, Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, as and together forming the Board of Street
4 Opening and Improvement of the City of New York,
Defendants.

} Complaint.

The plaintiff, for its complaint herein, alleges:

I.—That it is a domestic railroad corporation duly organized and existing under the laws of the State of

New York, and is the owner of an elevated railroad 5
system in the City of New York and vicinity, and is engaged in managing, operating and maintaining said elevated railroad system for the transportation of persons and property.

II.—That the defendants above named, as and together forming the Board of Street Opening and Improvement of the City of New York, are severally officers of the Mayor, Aldermen and Commonalty of the City of New York, a municipal corporation organized and existing under the laws of the State of New York, duly elected or appointed, have duly qualified, and are now acting under the several titles above designated, and together form the Board of Street Opening and Improvement of the City of New York. 6

III.—That the principal passenger station of the plaintiff in the City of New York is situated between State Street and Stone Street and Broad Street, and consists of two buildings, the westerly one of which was erected in 1871, and is known as the South Ferry Depot or Station, and the easterly one of which was erected in 1885, and is known as the "Addition" or "Annex" to the South Ferry Depot or Station. That during the year 1874, and soon after the erection of the said original South Ferry Depot or Station, the daily average number of trains arriving at, and departing from, the said South Ferry Depot or Station was about the number of 116; that during the year 1884 the daily average number of trains arriving at, and departing from, the said South Ferry Depot or Station was about the number of 202, and it thereupon became necessary for the plaintiff to acquire additional depot and station grounds for the proper operation and management of its railroads; and to meet that necessity, in the years 1884 and 1885, it enlarged the said 7 8

9 South Ferry Depot or Station by the erection of the said easterly building, pursuant to the provisions of Chapter 621 of the Laws of 1883, entitled "An Act enabling the Manhattan Elevated Railway Company to enlarge the passenger depot at State Street in the City of New York"; that during the year 1887 the daily average number of trains arriving at and departing from the said South Ferry Depot or Station was about the number of 210; that in the said year 1887
10 the said depot and station grounds had ceased to be of sufficient area to enable the plaintiff to properly manage and operate its railroads, and that the usefulness and capacity of the said station grounds were in that year and had been theretofore and now are greatly curtailed and decreased by reason of the fact that then and now various streets, viz.: Pearl Street, Bridge Street, Whitehall Street and Moore Street, were and are carried across the said station grounds by viaducts or bridges supported by piers which occupy large portions
11 of the surface of the said station grounds and interfere with the free use of said station grounds for railroad purposes; that thereupon and in or about the year 1887, it became necessary for the plaintiff to acquire additional station grounds for the purpose of handling, cleaning and storing cars, and in switching and making up trains, and for freight station purposes in the 23d and 24th Wards of the City of New York; that it was impracticable and substantially impossible
12 for the plaintiff to acquire additional station grounds immediately adjoining or contiguous to the said station grounds which it then owned by reason of the facts that all such adjoining or contiguous property was improved and built up with solid blocks of expensive buildings, that streets or avenues had been laid out, regulated, graded and paved through all such adjoining or contiguous property, and that the plaintiff

had no power or authority to discontinue, close or 13
obstruct the said streets or avenues; that thereupon
and in or about the year 1887, this plaintiff, at large
expense, acquired as such additional station grounds
required by it for freight purposes as aforesaid all that
tract or parcel of land situate in the 23d Ward of the
City of New York bounded westerly by Sheridan
Avenue, northerly by 161st Street, easterly by Morris
Avenue and by the lands then owned by the New
York and Harlem Railroad Company, and southerly 14
by the lands then owned by the New York and Har-
lem Railroad Company and the lands then owned by
the Spuyten Duyvil and Port Morris Railroad Com-
pany, the said southerly boundary being at or near
151st Street, and that this plaintiff is now the owner
of the fee and is in possession of the said parcel; that
at the time the said parcel was acquired by this plain-
tiff the said parcel was low, unimproved land; that no
streets or avenues had then or have since been laid out
or opened through the said parcel or any part thereof, 15
but that at the time said parcel was acquired by the
plaintiff as aforesaid Railroad Avenue west, from
Sheridan Avenue to Morris Avenue; Sherman Ave-
nue from Railroad Avenue west to 161st Street;
Grand Avenue from Railroad Avenue west to 161st
Street; East 153d Street west of Railroad Avenue
east; East 156th Street from Railroad Avenue east to
Sheridan Avenue; and East 158th Street from Morris
Avenue to Sherman Avenue, were shown upon the 16
maps and plans theretofore adopted by the Depart-
ment of Public Parks of the City of New York, and
that thereafter and on or about the 6th day of August,
1889, the said Department of Public Parks, pursuant
to the provisions of Chapter 721 of the Laws of 1887,
duly altered, amended and revised the maps or plans
theretofore adopted by authority of law and discon-

tinued, and closed the avenues and streets above mentioned, and that there have been since and there are now no streets or avenues laid out or opened through the said parcel or any part thereof; that this plaintiff, at further large expense, upon acquiring the said parcel as aforesaid filled in, graded and improved the same, and has erected various buildings and structures thereon, consisting of a round house, a machine shop, a carpenter shop, a paint shed, a wheel pit, a freight house, and platforms and sheds for cleaning cars, and along the northerly end of said station grounds has constructed a ramp approach to its said freight houses, and now uses all of the same for depot and station purposes in operating and managing its railroads and the said South Ferry Depot or Station for handling, cleaning, storing and repairing cars and engines, and for handling freight, and that all of the said land is now required by this plaintiff for the purposes of its incorporation and is now devoted to the purposes of its incorporation; that the daily average of trains arriving at and departing from the said South Ferry Depot or Station is now about the number of 268, exclusive of 141 trains which are moved between that part of the said South Ferry Depot or Station grounds at or near State street, and that part of the said station grounds last above described, in order that the cars and engines may be properly cleaned, repaired and made up into trains.

IV.—That the defendant, Louis F. Marcus, as Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, under and pursuant to the provisions of Chapter 545 of the Laws of 1890, and the acts amendatory thereof and supplemental thereto, and subject to the limitations in the said act provided, has the exclusive power to locate and lay

out, construct and maintain, all streets, roads, avenues, 21
public squares and places in the territory embraced within the 23d and 24th Wards of the City of New York, and exclusively possesses, exercises and is invested with, all the powers, rights, duties and authorities, and is subject to the obligations in relation to the said streets, roads, avenues, public squares and places which prior to the passage of the act, Chapter 545 of the Laws of 1890, were conferred upon, possessed and exercised by the Department of Public Parks of the 22
City of New York, under and by virtue of the laws of this State, except as in the said act provided; that under and pursuant to the said acts, it is the duty of the said defendant, Louis F. Marcus, as Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, on or before the first day of July, 1895, to complete the surveys, maps, plans and profiles of all the streets, roads, avenues, public squares and places located and laid out, or to be located and laid out, in the 23d and 24th Wards of the 23
City of New York, showing the location, width, grades and classes of the said streets, roads, avenues, public squares and places. And on completion thereof, it is the duty of the said defendant to submit the same to the defendants above named, forming the Board of Street Opening and Improvement of the City of New York, for the concurrence and approval of the said board, subject, nevertheless, to such correction or modification as in the judgment 24
of a majority of the said board may be advisable. And under and pursuant to the said acts, it is the duty of the said board thereafter, and on or before the first day of January, 1896, to file said maps, plans and profiles in the manner prescribed by law for the filing of such maps, plans and profiles. And under and pursuant to the said acts, it is the duty of the said defend-

25 ant, the Commissioner of Street Improvements of the
23d and 24th Wards of the City of New York, to certify the said maps, plans and profiles. And in and by said acts it is provided that the said maps, plans and profiles when so filed shall not be subject to any future change or modification, but shall be final and conclusive as to the location, width, grades and classes of the streets, roads, avenues, public squares and places exhibited on such maps, plans and profiles as well in
26 respect to the Mayor, Aldermen and Commonalty of the City of New York, as in respect to the owners and occupants of lands, tenements and hereditaments within the boundaries of the said 23d and 24th Wards, or affected by said streets, roads, avenues, public squares and places, and in respect to all other persons whomsoever.

V.—That the said defendant, Louis F. Marcus,
as Commissioner of Street Improvements of the
27 23d and 24th Wards of the City of New York, is proceeding with the work of completing the surveys, maps, plans and profiles of the streets, roads, avenues, public squares and places located and laid out, or to be located and laid out, in the 23d and 24th Wards of the City of New York, and has submitted various parts or sections of the said surveys, maps, plans and profiles, and among them a portion or section designated as Section VII., which includes
28 the said station grounds of the plaintiff in the 23d Ward of the City of New York, as hereinabove described, to the defendants forming the Board of Street Opening and Improvement of the City of New York, for concurrence and approval; that upon the said Section VII. of the said surveys, maps, plans and profiles, the said defendant, Louis F. Marcus, as Commissioner of Street Improvements of the 23d and

24th Wards of the City of New York, has without 29
authority of law and contrary to the statute in such
case made and provided, laid out and designated
three streets across the said station grounds of the
plaintiff in the 23d Ward of the City of New York, to
wit, East 153d Street, East 156th Street and East
158th Street, and has laid out and designated a pro-
posed widening of East 161st Street on the southerly
side thereof by taking forty feet off from the
northerly end of the said station grounds, and as 30
such Commissioner and as member of the said Board
of Street Opening and Improvement, seeks to have
the said Board of Street Opening and Improvement
concur in and approve the laying out of said East
153d Street, East 156th Street and East 158th Street
across and through the said station grounds and the
proposed widening of East 161st Street on the
southerly side thereof by taking forty feet off from
the northerly end of the said station grounds, and to
have the said surveys, maps, plans and profiles show- 31
ing the said streets and proposed widening, as afore-
said, certified and filed; that the completion of the
said surveys, maps, plans and profiles showing the
said streets across and through the said station
grounds of the plaintiff, the submission thereof to the
said Board of Street Opening and Improvement for
its concurrence and approval, and the certifying and
filing thereof, are steps in the proceedings prescribed
by law for locating, laying out, opening, construct- 32
ing, regulating and grading streets in the 23d Ward
of the City of New York, and as plaintiff is informed
and believes are being taken, or are intended to be
taken, by the defendants with the intention and pur-
pose of locating, laying out, opening, constructing,
regulating and grading the said streets through the
said station grounds of the plaintiff; and that the

power and authority to locate, lay out, construct regulate and grade the streets and avenues in the 23d and 24th Wards of the City of New York, where such power and authority exist, is vested in the defendant above named, Louis F. Marcus, as Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, and that the power and authority to open streets and avenues in said wards, where such power and authority exist, is vested in the above named, as, and together forming, the Board of Street Opening and Improvement of the City of New York.

VI.—That all of the lands which would be required for the purpose of laying out, opening and constructing the said East 153d Street, East 156th Street and East 158th Street through the said station grounds of the plaintiff, and for laying out and constructing the proposed widening of East 161st Street, on the southerly side thereof, by taking forty feet off from the northerly end of the said station grounds of the plaintiff herein, are now used by the plaintiff exclusively for cleaning, repairing, handling and storing cars and engines, and for depot and station purposes, and are required and are necessary for such uses and purposes, and for the uses and purposes of the incorporation of the plaintiff, and are now devoted to and used by the plaintiff for such purposes, and that the laying out and opening of the said streets through the said depot and station grounds of the plaintiff as aforesaid, and the proposed widening of 161st Street as aforesaid, would destroy, or substantially destroy, the entire parcel of land in the Twenty-third Ward hereinbefore described, for the uses and purposes for which it has been acquired and is now used by the plaintiff as aforesaid; and that the said streets, or

some of them, would pass through and destroy the 37
shops, freight houses, platforms and buildings of the plaintiff now constructed and used on said depot and station grounds, and the widening of 161st Street as aforesaid would destroy the said ramp approach.

VII.—That, as the plaintiff is informed and believes, the laying out, opening and construction of the said streets through the said station grounds of the plaintiff, and the proposed widening, or attempting 38
widening, of 161st Street as aforesaid, is an abuse of, and an unlawful exercise of, the discretion and authority confided in or conferred upon the defendants, or any of them, and that there is no public necessity for the laying out, opening or construction of the said streets through the station grounds of the plaintiff and for the proposed widening of 161st Street as aforesaid, as shown upon the said surveys, maps, plans and profiles; and that the necessities and 39
needs of the locality for streets and avenues would be fully provided for without the said streets across the said station grounds and without the said widening of 161st Street; and that the laying out, opening and construction of the said East 153d Street, East 156th Street and East 158th Street and the widening of the said 161st Street on the southerly side thereof by taking forty feet off from the northerly end of the said station grounds will cause and do irreparable injury and damage to this plaintiff, and will greatly 40
reduce and curtail the station facilities of the plaintiff in the City of New York, and will greatly hinder and embarrass the plaintiff in the proper discharge of its duties as a carrier of persons and property, and will cause and result in great inconvenience, delay, injury and damage to persons using the railroads of the plaintiff and to the public generally, and that this

41 plaintiff has not consented and does not now consent to the construction of the said streets through the said station grounds or to the widening of East 161st Street as aforesaid; and that this plaintiff has no remedy therefor at law.

Wherefore, the plaintiff demands that the said defendant Louis F. Marcus, as Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, be perpetually restrained
42 and enjoined from making, certifying or filing the said surveys, maps, plans and profiles, or any surveys, maps, plans and profiles, showing said East 153d Street, East 156th Street and East 158th Street as laid out, or to be laid out, through or across the said station grounds, or showing the said East 161st Street as widened, or to be widened, on the southerly side thereof by taking forty feet off from the northerly end of the said station grounds, and from locating, laying out, constructing or main-
43 taining the said streets across the said station grounds, and that the said defendants above named, as and together forming the Board of Street Opening and Improvement of the City of New York, be perpetually restrained and enjoined from concurring in or approving the said surveys, maps, plans and profiles, or any surveys, maps, plans and profiles, showing the said East 153d Street, East 156th Street and East 158th Street, as laid out, or to be laid
44 out, through and across the said station grounds, or showing the said East 161st Street as widened, or to be widened, on the southerly side thereof as aforesaid, and from filing any such surveys, maps, plans or profiles, and from opening East 153d Street, East 156th Street and East 158th Street, or either of them, through and across the said station grounds, and from widening East 161st Street as aforesaid, without the

consent of this plaintiff, and that any such surveys, 45
maps, plans and profiles which have been or which may be made, certified or filed, showing East 153d Street, East 156th Street and East 158th Street as laid out, or to be laid out, through and across the said station grounds, or showing East 161st Street as widened, or to be widened, on the southerly side thereof by taking forty feet off the northerly end of the said station grounds, be declared void and of no effect, and that this plaintiff have judgment accordingly, and 46
that a preliminary injunction be granted the plaintiff during the pendency of this action, and for such other or further relief as to the Court may seem proper, besides the costs of this action.

JAMES THOMAS,
Plaintiff's Attorney.
Office and P. O. Address,
Room 9, South Ferry Depot,
New York City. 47

STATE OF NEW YORK, }
City and County of New York, } ss.:

D. W. MCWILLIAMS, being duly sworn, says: That he is the treasurer of the Manhattan Elevated Railway Company, the plaintiff herein; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. 48

D. W. MCWILLIAMS.

Sworn to before me this }
28th day of May, 1895. }

H. B. DWYER,
Notary Public,
New York County.

49 SUPREME COURT.

TRIAL DESIRED IN NEW YORK COUNTY.

THE MANHATTAN ELEVATED RAILWAY COMPANY,
Plaintiff,

against

50 LOUIS F. MARCUS, as Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York,

and

WILLIAM L. STRONG, Mayor of the City of New York; ASHBEL P. FITCH, Comptroller of the City of New York; WILLIAM BROOKFIELD, Commissioner of
51 Public Works of the City of New York; DAVID H. KING, JR., President of the Department of Public Parks of the City of New York; JOHN JEROLOMAN, President of the Board of Aldermen of the City of New York; and LOUIS F. MARCUS, Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, as and together
52 forming the Board of Street Opening and Improvement of the City of New York,
Defendants.

Answer.

The defendants, answering the complaint of the plaintiff above named, respectfully show to this Court:

FIRST.—The defendants admit the allegations in 53
the paragraphs of the complaint marked, I. and II.

SECOND.—They admit that the plaintiffs have a passenger station, known as the South Ferry Depot or Station, at or near State Street, in the City of New York; but they have no knowledge or information sufficient to form a belief as to the number of buildings of which the same consists, nor when they were erected, nor by what name they are known, nor have they any knowledge or information sufficient to form 54
a belief as to the average number of trains arriving at the said station during the years 1874 and 1884, nor have they any knowledge or information sufficient to form a belief as to when, if at any time, it became necessary to enlarge the said station or to erect new buildings.

They have no knowledge or information sufficient to form a belief as to the average number of trains arriving at said station in the year 1887, nor as to 55
the limits between which said station existed at that time, except that it did not exist above Stone Street.

They deny that the usefulness and capacity of the said station ground were greatly curtailed and decreased by the fact that certain viaducts or bridges were carried across the said station yards; and they deny that the said viaducts or bridges did interfere with the free use of the said grounds for railroad purposes. 56

They have no knowledge or information sufficient to form a belief whether, in the year 1887, it became necessary for the plaintiff to enlarge the said station for the purpose of handling, cleaning and storing cars, and for switching freight trains and for freight station purposes in the Twenty-third and Twenty-fourth Wards.

57 They deny, on information and belief, that it was impracticable and substantially impossible for the plaintiff to acquire additional station grounds adjoining or contiguous to the said grounds at or near State Street, but allege, on the contrary, that the plaintiff was invested with full power and authority by the exercise of the right of eminent domain to acquire sufficient lands for its uses and purposes in the vicinity.

The defendants deny that in or about the year 1887
58 the plaintiff acquired additional station grounds for freight purposes of the tract of land bounded westerly by Sheridan Avenue, northerly by 161st Street; easterly by Morris Avenue and by the lands then owned by the New York and Harlem Railroad Company, and southerly by the lands then owned by the New York and Harlem Railroad Company and the lands owned by the Spuyten Duyvil and Port Morris Railroad Company; but they allege that the said lands, or so much thereof as are affected by the maps referred
59 to in this suit and proposed to be filed, were acquired by private parties and deeded to one Alfred Skitt and to one W. J. Fransioli, by whom they were conveyed to the plaintiff.

They deny that no streets or avenues had then, or have since, been laid out or opened through the said parcel or any part thereof.

They deny that at the time said parcel was acquired by the plaintiff Railroad Avenue west from Sheridan
60 Avenue to Morris Avenue; Sherman Avenue, from Railroad Avenue west to 161st Street; Grant Avenue, from Railroad Avenue west to 161st Street; East One Hundred and Fifty-third Street west of Railroad Avenue, East; East One Hundred and Fifty-sixth Street, from Railroad Avenue east to Sheridan Avenue; and East One Hundred and Fifty-eighth Street, from Morris Avenue to Sherman Avenue, were shown upon the maps adopted by the Department of Public Parks.

They deny that thereafter the Department of Public 61
Parks, pursuant to the provisions of Chapter 721 of the Laws of 1887, duly altered, amended and revised the maps or plans theretofore adopted by authority of law, and discontinued and closed the avenues and streets above mentioned, and that there have been since and there are now no streets or avenues laid out or opened through the said parcel, or any part thereof.

They have no knowledge or information sufficient to form a belief whether the plaintiff graded and im- 62
proved the said lands, or whether the same were graded and improved at the expense of private individuals, or by others than the plaintiff.

They admit that there are certain structures or buildings upon parts of said property, but they have no knowledge or information sufficient to form a belief as to whether the plaintiff erected them, nor whether the plaintiff constructed a ramp approach; and they deny, on information and belief, that the said Railroad 63
Company uses all of the said property for depot and station purposes in operating and managing its railroads and the said South Ferry Station, or for handling, cleaning, storing and repairing cars and engines and for handling freight, and that all of the said land is now required by the plaintiff for the purpose of its incorporation, and is now devoted to the purposes of its incorporation.

They have no knowledge or information sufficient to form a belief as to the daily average number of 64
trains arriving at and departing from the South Ferry Station.

THIRD.—The defendants admit that Louis F. Marcus, as Commissioner of Street Improvements in the Twenty-third and Twenty-fourth Wards, has certain powers and authority by virtue of chapter 545 of the

65 Laws of 1890 and various other statutes of the State of New York, and they beg leave to refer to the same for a full statement of his powers and duties. They also admit that the Board of Street Opening and Improvement has also certain powers and duties relating to the laying out of streets and the filing of maps set forth at length in various statutes relating to the said Board, to which they beg leave to refer for their contents and legal effect.

66 FOURTH.—They admit that the said Louis F. Marcus is proceeding with the work of completing the surveys, maps and plans of various streets, roads and avenues of the Twenty-third and Twenty-fourth Wards of the City of New York, and that he has submitted, among other proposed maps, a section designated as section 7, to the Board of Street Opening and Improvement, for its concurrence and approval, which includes the property hereinbefore referred to; but they deny that
67 the said property is station grounds of the plaintiff.

They deny that the said Louis F. Marcus has, without authority of law and contrary to the statute in such cases made and provided, laid out three streets across the said station grounds of the plaintiff, to-wit, East 153d Street, East 156th and East 158th Streets, and has laid out and designated a proposed widening of East 161st Street; but they allege on the contrary that he has proposed the said changes with full authority
68 of law, and in compliance with the duties and obligations imposed upon him by the statutes of this State.

They admit that the said Louis F. Marcus seeks to have the said Board of Street Opening and Improvement concur and approve of his laying out of the said streets, although they deny that the said streets run across or through the station grounds of the plaintiff. And they admit that he desires to have the said proposed maps certified and filed.

They admit that the completion of the said surveys 69
and maps showing the said streets, and the submission thereof to the Board of Street Opening and Improvement for its concurrence and approval, and the certifying and filing thereof, are necessary acts preliminary to the actual construction of said streets; but they deny that they are steps in the proceeding prescribed by law for locating, laying out, opening, constructing, regulating and grading streets; and they allege that the said act of laying out said streets is a separate, 70
distinct and independent act, and that it does not follow therefrom that title to the land over which said proposed streets run will ever be acquired by the city, or that streets or viaducts will ever be constructed thereon. Whether or not that shall be done depends upon subsequent action of the city authorities, if said maps should be filed showing the laying out of the said streets.

The defendants have no knowledge or information 71
sufficient to form a belief as to whether title will be acquired to the said land over which the said proposed streets may run, or whether the said streets will be constructed.

FIFTH.—They deny, on information and belief, that the lands required for the purpose of laying out the said streets run through the station grounds of the plaintiff, and that the said lands are used exclusively for cleaning, repairing, handling and 72
storing cars and engines, and for depot and station purposes, and are required and necessary therefor; and they deny that they are now devoted to and used by the plaintiff for said purposes, and they deny that the opening of said streets would destroy, or substantially destroy, the entire parcel of land referred to, and allege on the contrary that it would be

73 no substantial injury to the said property for the purposes for which it is used.

They deny that the said streets, or some of them, would pass through and destroy the shops, freight houses, platforms and buildings of the plaintiff now constructed, and that the widening of One Hundred and Sixty-first Street would destroy the said ramp approach.

SIXTH.—The defendants deny that the said open-
74 ing and widening of the said streets is an abuse of and an unlawful exercise of the discretion and authority confided in or conferred upon the defendants, or any of them; and they deny that there is no public necessity for the laying out of the said streets as proposed; but they allege, on the contrary, that the said proposed laying out and widening is very much needed in the locality, and is a proper and lawful exercise of the discretion and powers conferred upon
75 the defendants.

They deny that the necessities and needs of the locality would be fully provided for without the said streets, and they deny that the laying out and widening of the same, or the opening or construction thereof, would cause and do irreparable injury and damage to the plaintiff, and would greatly reduce and curtail the station facilities of the plaintiff in the City of New York, or would greatly hinder and embarrass
76 the plaintiff in the discharge of its duties as a carrier of persons and property, or would result in great inconvenience, delay, injury and damage to persons using the railroads of the plaintiff, and to the public generally; but they allege, on the contrary, that little, if any, injury would be done to the plaintiff by the said proposed laying out of streets, and that it would be a great public benefit if the said streets were constructed as proposed.

They deny that the plaintiff has no remedy at law, 77
but allege, on the contrary, that any injury that might be sustained by the plaintiff would be fully compensated for by damages which it would recover from the City of New York, should any damage be caused.

Wherefore, the defendants demand that the complaint be dismissed, with costs.

FRANCIS M. SCOTT, 78
Counsel to the Corporation.

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81 SUPREME COURT.

COUNTY OF NEW YORK.

THE MANHATTAN ELEVATED RAILWAY COMPANY,
Plaintiff,

against

82 LOUIS F. MARCUS, as Commissioner of Street Improvements of the 23d and 24th Wards, and WILLIAM L. STRONG and others, composing the Board of Street Opening and Improvement of the City of New York,
Defendants.

Verification of answer.

STATE OF NEW YORK, }
83 City and County of New York, } ss.:

LOUIS F. MARCUS, being duly sworn, deposes and says:

I am Commissioner of Street Improvements of the Twenty-third and Twenty-fourth Wards, and one of the defendants in the action entitled as above.

I am also a member of the Board of Street Opening and Improvement of the City of New York, the members of which are also defendants in the above-entitled
84 action.

The foregoing answer is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

The reason why this verification is not made by the defendants is that they and myself constitute the Board of Street Opening and Improvement, and the

matters referred to in the said action are matters with which I am personally familiar.

85

The grounds of my belief as to all matters not stated in the action upon my own knowledge are as follows:

Information obtained from the books and records of the various departments of the city government, and statements made to me by the officers or agents of the plaintiff.

LOUIS F. MARCUS.

86

Sworn to before me this 24th day of June, 1895.

G. L. STERLING,
Notary Public,
New York County.

87

88

89 SUPREME COURT.

NEW YORK COUNTY.

THE MANHATTAN RAILROAD COMPANY,

Plaintiff,

against

LOUIS F. MARCUS, as Commissioner of Street Improvements
90 of the 23d and 24th Wards of the City of New York,

and

WILLIAM L. STRONG, Mayor of the City of New York; ASHBEL P. FITCH, Comptroller of the City of New York; WILLIAM L. BROOKFIELD, Commissioner of Public Works of the City of
91 New York; DAVID H. KING, JR., President of the Department of Public Parks of the City of New York; JOHN JEROLOMAN, President of the Board of Aldermen of the City of New York, and LOUIS F. MARCUS, Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York, as and together forming the Board of Street
92 Opening and Improvement in the City of New York,

Defendants.

STATE OF NEW YORK,
City and County of New York, } ss.:

JAMES THOMAS, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the

above-entitled action ; that this action was commenced 93
on or about the 29th day of May, 1895, by the service of the summons, complaint and injunction order and order to show cause granted by Mr. Justice Ingraham, on the 29th day of May, 1895, and the affidavits upon which the said injunction order and order to show cause was made upon the defendants. That the answer of the defendants was served on or about the 26th day of June, 1895; that upon the return of the said injunction order and order to show cause, a 94
motion thereon to continue the said injunction during the pendency of the action was heard by Mr. Justice Lawrence, on or about the 26th day of June, 1895, and that an order was made at a Special Term of the Supreme Court held at the County Court House in the City of New York, on the 26th day of June, 1895, denying the said motion, and vacating and setting aside the said injunction, dated May 29, 1895; that from the said order, dated June 26, 1895, the plaintiff 95
appealed to the General Term of the Supreme Court, First Department, and that on or about the 15th day of November, 1895, the General Term made an order, dated that day, affirming the said order of June 26, 1895; that this action was duly noticed for trial by plaintiff for the Special Term of this Court appointed to be held in the City of New York on the first Monday of October, 1895, and by both plaintiff and defendant, for a Speeial Term of this Court appointed to be held on the first Monday of April, 1896, and is 96
now on the present calendar of this Court, but has never been brought to trial.

Deponent further says, upon information and belief, that since the commencement of this action, and since the said order of June 26, 1895, vacating the said injunction, the following action and proceedings have been taken or commenced by or on behalf of the

97 defendants in respect to making, certifying and filing surveys, maps, plans and profiles showing East 153d Street, East 156th Street and East 158th Street, as laid out or to be laid out, through or across the station grounds of the plaintiff, mentioned in the complaint, and showing East 161st Street as widened, or to be widened, on the southerly side thereof by taking forty feet off the northerly end of said station grounds, and in respect to concurring in or approving the said sur-
98 veys, maps, plans and profiles, and in respect to opening East 153d Street, East 156th Street, East 158th Street, through the said station grounds, and the widening of East 161st Street on the southerly side thereof, as aforesaid, viz.:

FIRST.—On or about the second day of November, 1895, the defendants above named, as and together forming the Board of Street Opening and Improvement of the City of New York, having on the said
99 29th day of May, 1895, concurred in and approved, or voted to concur in and approve, surveys, maps, plans and profiles showing East 153d Street, East 156th Street and East 158th Street, as laid out or to be laid out through and across said station grounds, and showing said East 161st Street, as widened or to be widened on the southerly side thereof, as aforesaid, filed, or caused to be filed, such surveys, maps, plans and profiles, one copy in the office of the Secretary of
100 State of the State of New York, one copy in the office of the Register of the City and County of New York, and one copy in the office of the Commissioner of Street Improvements of the 23d and 24th Wards of the City of New York.

SECOND.—That on or about the 5th day of July, 1895, the defendants above named (or their successors in office), as, and together forming the Board of Street

Opening and Improvement of the City of New York, 101
adopted the following resolutions for the opening and extending of said East 161st Street, mentioned in the complaint herein, from Elton Avenue to Mott Avenue, and for the purpose of acquiring and vesting in the defendant, the Mayor, Aldermen and Commonalty of the City of New York, the title to the land lying within the lines of such street, and requesting the Counsel to the Corporation to take the necessary legal proceedings to acquire title to such lands, namely: 102

"*Resolved*, That the Board of Street Opening and Improvement deems it for the public interest that the title to lands and premises required for the opening and extending of East 161st Street, from Elton Avenue to Mott Avenue, should be acquired by the Mayor, Aldermen and Commonalty of the City of New York, at a fixed or specified time."

103

"*Resolved*, That it appears to this Board, from the surveys made, and information furnished to it by the Commissioner of Street Improvements of the 23d and 24th Wards, that there are buildings upon the lands, that shall or may be required for the purpose of opening and extending said East 161st Street, from Elton Avenue to Mott Avenue."

"*Resolved*, That this Board directs that upon a date to be hereafter more fully specified, not 104
less than six months after the filing of the oaths of the Commissioners of Estimate and Assessment, who may be appointed by the Supreme Court in proceedings for the acquisition of title to such street or avenue, that the title to any piece or parcel of land lying within the lines of such East 161st Street, from Elton Avenue to

105 Mott Avenue, so required, shall be vested in the Mayor, Aldermen and Commonalty of the City of New York."

"*Resolved*, That the Board of Street Opening and Improvement, deeming it for the public interest so to do, hereby requests the Counsel to the Corporation to take the necessary proceedings, in the name of the Mayor, Aldermen and Commonalty of the City of New York, to acquire
106 title, wherever the same has not been heretofore acquired, for the use of the public, to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending East 161st street, from Elton Avenue to Mott Avenue."

"*Resolved*, That the entire cost and expense of said proceedings shall be assessed upon the property deemed to be benefitted thereby,"
107 and that the opening and extending of said East 161st street, in accordance with the said resolutions, will require the taking of forty (40) feet off from the northerly end of the station grounds of the plaintiff, as set forth in the complaint herein, the said station grounds being situated between said Elton Avenue and said Mott Avenue.

THIRD.—That on or about the 7th day of Jan-
108 uary, 1897, the Counsel to the Corporation commenced a certain proceeding entitled: "In the matter of the application of The Mayor, Aldermen and Commonalty of the City of New York, relative to acquiring title, wherever the same has not been heretofore acquired, to East One Hundred and Sixty-first Street (although not yet named by proper authority), from Elton Avenue to Mott Avenue, in the Twenty-third

Ward of the City of New York, as the same has been 109
heretofore laid out and designated as a first-class street or road," and gave notice by publication thereof in the City Record, on that day, that pursuant to the statutes in such cases made and provided, application will be made to this Court, at a Special Term thereof, to be held in Part III. in the County Court House in the City of New York, on the 19th day of January, 1897, for the appointment of Commissioners of Estimate and Assessment in the above-entitled matter, 110
and gave notice that the nature and extent of the improvement thereby intended is the acquisition of title by the Mayor, Aldermen and Commonalty of the City of New York, for the use of the public, to all the lands and premises, with the buildings thereon and the appurtenances thereunto belonging, required for the opening of a certain avenue known as East 161st Street, from Elton Avenue to Mott Avenue, in the 23d Ward of the City of New York, being pieces
or parcels of land, and among them, Parcel "B," 111
described as follows: "Beginning at the intersection of the eastern line of Sheridan avenue with the southern line of East One Hundred and Sixty-first street (legally opened November 16, 1880). 1st. Thence southwesterly along the eastern line of Sheridan avenue for 40.45 feet. 2d. Thence easterly deflecting 98 degrees 35 minutes 59 seconds to the left for 736.98 feet to the western line of Morris Avenue. 3d.
Thence northerly along the western line of Morris 112
avenue for 40 feet to the southern line of East One Hundred and Sixty-first street (legally opened November 16, 1880). 4th. Thence westerly along the southern line of said East One Hundred and Sixty-first street for 730.93 feet to the point of beginning."

FOURTH.—That on or about the 9th day of No-

113 vember, 1896, the defendants above named (or their successors in office), as and together forming the Board of Street Opening and Improvement of the City of New York, duly adopted the following resolutions:

"*Resolved*, that the Board of Street Opening and Improvement deems it for the public interest that the title to the lands and premises required for the opening and extending of East 153d
114 Street, from Railroad Avenue East to Mott Avenue, should be acquired by the Mayor, Aldermen and Commonalty of the City of New York, at a fixed or specified time."

"*Resolved*, that it appears to this Board, from the surveys made and information furnished to it by the Commissioner of Street Improvements of the 23d and 24th Wards, that there are no buildings upon the lands that shall or may be required
115 for the purpose of opening and extending said East 153d Street, from Railroad Avenue East to Mott Avenue."

"*Resolved*, that this Board directs that upon the date of the filing of the oaths of the Commissioners of Estimate and Assessment, who may be appointed by the Supreme Court in proceedings for the acquisition of title to said street or avenue, the title to any piece or parcel of land
116 lying within the lines of such East 153d Street, from Railroad Avenue East to Mott Avenue, so required, shall be vested in the Mayor, Aldermen and Commonalty of the City of New York."

"*Resolved*, that the Board of Street Opening and Improvement, deeming it for the public interest so to do, hereby requests the Counsel to the Corporation to take the necessary proceed-

ings, in the name of the Mayor, Aldermen and Commonalty of the City of New York, to acquire title, wherever the same has not been heretofore acquired, for the use of the public, to the lands, tenements and hereditaments that shall or may be required for the purpose of opening and extending East 153d Street, from Railroad Avenue East to Mott Avenue." 117

"*Resolved*, that the entire cost and expense of said proceedings shall be assessed upon the property deemed to be benefited thereby"; 118

and that all the lands required for the opening and extending of said East 153d Street, in accordance with the said resolution, are the lands of the plaintiff, and form a part of its station grounds, as set forth in the complaint herein.

The plaintiff, therefore, on this affidavit, and on the pleadings herein, and on all the proceedings in this action, makes this application for permission to make and serve a supplemental complaint alleging the facts hereinbefore set forth, which have occurred since the making and serving of the complaint herein, in addition to the said complaint, and for such other and further relief as may be proper. 119

JAMES THOMAS.

Subscribed and sworn to before me
this 14th day of January, 1897. 120

H. B. DWYER,
Notary Public,
New York County.

121 SUPREME COURT.

NEW YORK COUNTY.

THE MANHATTAN ELEVATED RAILWAY COMPANY,
Plaintiff,

122 against

LOUIS F. MARCUS, as Commissioner of Street Improvement of the 23d and 24th Wards of the City of New York,

and

123 WILLIAM L. STRONG, Mayor of the City of New York, et al.,
Defendants.

SIR:

Please take notice that on the annexed affidavit of
124 James Thomas, verified January 14, 1897, and on the pleadings, and on all the proceedings herein, a motion will be made on the part of the plaintiff at a Special Term of this Court, to be held at the County Court House (Part I.) in the City of New York, on the 19th day of January, 1897, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order permitting the plaintiff to

make and serve a supplemental complaint herein, in addition to the said complaint, and for such other relief as may be just and proper. 125

Dated January 14, 1897.

Yours, &c.,

JAMES THOMAS,
Attorney for Plaintiff,
Room 9, South Ferry Depot,
New York City.

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To FRANCIS M. SCOTT, Esq.,
Counsel to the Corporation,
No. 2 Tyron Row,
N. Y. City.

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Plaintiff's Complaint.

N. Y. SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

WILLIAM B. MORGAN

against

2 GEORGEANNA DIEHL and others.

The complaint of the plaintiff by Hazel & Benedict, his attorneys, respectfully shows to the Court:

1. That between the first day of November, 1888, and the first day of May, 1889, the plaintiff and the
3 defendants Ernest H. Morgan and Robert J. Hare Powel were attorneys and counsellors at law, duly admitted to practice in all the Courts of the State of New York, and were copartners carrying on a law business under the firm name and style of Morgan & Morgan, in the City of New York and elsewhere.

2. That on or about said last named date, said defendant Ernest H. Morgan, retired from said firm and
4 for a valuable consideration sold and transferred to this plaintiff and said defendant Robert J. Hare Powel all his right, title and interest in and to all moneys due and owing by the defendant Diehl, as hereinafter stated, to said firm of Morgan & Morgan.

3. That from and after the retirement of said Ernest H. Morgan from said firm of Morgan & Morgan as aforesaid, the plaintiff and the defendant Robert J. Hare Powel, under said firm name of Morgan & Mor-

gan, continued, conducted and performed the hereinafter mentioned legal business of said defendant Diehl, then Fricke, at her special instance and request. 5

4. That between the first day of November, 1888, and the first day of January, 1892, the said plaintiff and his said copartners, under the firm name of Morgan & Morgan, at the special instance and request of the defendant Georgeanna Diehl, who was then Georgeanna Fricke, performed and rendered legal services to and for said defendant Diehl, then Fricke, in and about the probate of the will of John Henry Fricke. That said John Henry Fricke died in the year 1888, and said Georgeanna Fricke, thereafter and before the commencement of this action, married one Henry Diehl. 6

5. That said legal services so rendered and performed by the plaintiff and his copartners for said defendant Diehl then Fricke, were reasonably worth the sum of Thirty-five hundred dollars. 7

6. That said defendant Diehl has paid on account of said legal services so rendered her as aforesaid the sum of Eight hundred dollars and no more.

7. That said defendant Ernest H. Morgan has declined to join with plaintiff in bringing this action and he has therefore been made a defendant herein.

8. That said defendant Powel is now a copartner in business with Henry Diehl, who is the present husband of said defendant Georgeanna Diehl, and he has refused to join with plaintiff in bringing this action, and he has therefore been made a defendant herein. 8

Wherefore plaintiff demands judgment against said defendant Georgeanna Diehl in favor of himself and

the said defendant Robert J. Hare Powel for the sum of Twenty-seven hundred dollars, with interest thereon from January 1st, 1892, together with costs.

HAZEL & BENEDICT,
Plaintiff's Attorneys,
44 Pine St., N. Y.

CITY OF NEW YORK, }
COUNTY OF NEW YORK. } ss. :

WILLIAM B. MORGAN, being duly sworn, says that he is the plaintiff herein, that the foregoing complaint is true to his own knowledge except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WM. B. MORGAN.

Sworn to before me this }
29th day of July, 1897. }

ROBERT V. S. SAMUELS,
Notary Public,
N. Y. County.

Amended Answer of Defendant Diehl.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

WILLIAM B. MORGAN, Plaintiff. against GEORGEANNA DIEHL, formerly GEORGEANNA FRICKE, ERNEST H. MORGAN, and ROBERT J. HARE POWEL, Defendants.	Amended Answer of defendant Georgeanna Diehl.

The defendant herein, Georgeanna Diehl, by this her amended answer, answering the complaint of the plaintiff in the above-entitled action:

First.—Denies that she has any knowledge or information thereof sufficient to form a belief as to each and every of the allegations contained in paragraphs marked "1" (one) and "2" (two) respectively in said complaint.

She denies each and every allegation contained in paragraph marked "3" (three) in the said complaint.

She denies the allegations contained in paragraph marked "4" (four) in said complaint, "that between the first day of November, 1888, and the first day of January, 1892, the said plaintiff and his said copartners, under the firm name of Morgan & Morgan, at the special instance and request of the defendant Georgeanna Diehl, who was then Georgeanna Fricke,

17 performed and rendered legal services to and for said defendant Diehl, then Fricke, in and about the probate of the will of John Henry Fricke."

She denies each and every allegation contained in paragraphs respectively marked "5" (five), and "6" (six) in said complaint.

Denies that she has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph marked "7"
18 (seven) in said complaint.

Denies that she has any knowledge or information thereof, sufficient to form a belief as to the allegations contained in paragraph marked "8" (eight) in said complaint: "That defendant Powel has refused to join with plaintiff in bringing this action, and he has therefore been made a defendant herein."

Second.—And the said defendant Georgeanna Diehl, further answering the complaint in this action,
19 and for a further, separate and distinct defense thereto, avers and alleges, upon her information and belief:

1. That the plaintiff was engaged in the practice of the law, between the 13th day of December, 1881, and the 31st day of August, 1885, as a member of the firm of Morgan & Hoffman; and between the 31st day of August, 1885, and the first day of May, 1890, was a member of the firm of Morgan & Morgan, and
20 thereafter, as a member of the firm of Morgan & Powell, located and carrying on business at the City of New York.

2. That between said 13th day of December, 1881, and the first day of February, 1891, one Henry Diehl, an attorney and counsellor-at-law, duly admitted to practice in the Supreme Court of the State of New York, and in all the Courts of the State of New York

was at all times between said times aforementioned, 21
managing clerk in the employ of and engaged by Morgan & Hoffman, Morgan & Morgan, and Morgan & Powell respectively, whereof as hereinbefore set out, the plaintiff was a partner.

3. That during the aforesaid period of employment of said Henry Diehl as managing clerk, and by their request and with their permission and consent, he was engaged in the practice, business and profession of an 22
attorney and counsellor at law, on his sole and separate account, at the request and consent of plaintiff and said firms, upon the terms and conditions hereinafter more specifically set out.

4. That at or about the 13th day of December, 1881, it was agreed by and between the plaintiff and his then partners George Hoffman and Ernest H. Morgan, one of the defendants in this action then composing 23
the firm of Morgan & Hoffman and said Henry Diehl, and as a part of the contract of employment of said Henry Diehl as aforesaid, that he, said Henry Diehl, during his employment by them should share and divide all the retainers, fees and compensations, arising out of and from all lawsuits and business matters procured by or in which said Henry Diehl should be concerned or employed on his sole and separate account, in the following proportions, viz.: the said Henry
Diehl should be entitled to and receive and retain 24
sixty per centum thereof, and the said William B. Morgan and his then partners aforesaid, should be entitled to the remaining forty per centum thereof, upon the condition and agreement on the part of said plaintiff and his then partners composing the firm of Morgan & Hoffman in consideration of the said payment by said Henry Diehl to said Morgan & Hoffman of

25 forty per centum of all the profits, retainers, fees and compensations arising out of the lawsuits, business matters and employments as attorney and counsellor at law, procured by said Henry Diehl for himself and for the plaintiff William B. Morgan and his partners, then the said firm of Morgan & Hoffman, that they, said firm of Morgan & Hoffman, were to take the whole general charge, management and direction of all professional business procured by, or wherein the
26 said Henry Diehl might be employed, and that they would, to their best endeavors, superintend, and in their name when requested, conduct and carry on the same with diligence and to the utmost of their professional skill; and the said plaintiff and his firm agreed that they would devote their time and attention, as well as that of their assistants and office staff, to all the litigation, business and professional matters procured by or wherein said Henry Diehl should be concerned or employed as aforesaid, and agreed that
27 said Henry Diehl should at his option have the right and privilege to manage and carry on the same in the firm name of the plaintiff's said firm.

5. That thereafter and on the 31st day of August, 1885, the said George Hoffman died, leaving said plaintiff and said defendant Ernest H. Morgan the sole surviving partners of said firm of Morgan & Hoffman, who thereafter and on or about the 24th
28 day of September, 1885, became partners, and from thenceforth continued and carried on said business under the firm name of Morgan & Morgan; and thereupon the said plaintiff and said defendant, Ernest H. Morgan, under the firm name of Morgan & Morgan, assumed, undertook and continued all the unfinished business and professional matters then pending, which had been procured by said Henry Diehl in the course

of his practice, and which under his contract of em- 29
ployment he had placed in charge of said firm of Morgan & Hoffman, and said Henry Diehl, thereupon entered into the employment of said firm of Morgan & Morgan, as their managing clerk, upon the same terms, conditions and agreement under which he had been employed by the firm of Morgan & Hoffman as hereinbefore set out, and said William B. Morgan and Ernest H. Morgan agreed with said Henry Diehl to continue the agreement aforesaid and to give respect- 30
ively their general assistance, counsel and advice, and the time and attention of their assistants and office staff, to all of the business and professional matters procured by said Henry Diehl, or in which he might be employed or concerned, or which were then pending, and to take the whole general charge, management and direction of, in the same manner and under and in pursuance of the same terms, conditions and agreements as had been theretofore done by the firm
of Morgan & Hoffman, and upon a like division with 31
said Morgan & Morgan of the emoluments derived by said Henry Diehl, mentioned in paragraph marked "4" of this separate defense numbered "Second."

6. That on or about the 1st day of July, 1886, the defendant Robert J. Hare Powel was taken into and became a member of the said firm of Morgan & Morgan, and from thenceforth, the said plaintiff and his
firm, continued the employment of said Henry Diehl 32
as their managing clerk, upon all the terms and conditions of his contract of employment with Morgan & Hoffman and Morgan & Morgan hereinbefore and more specifically set forth, and upon the distinct understanding and agreement that said William B. Morgan and Ernest H. Morgan should continue respectively as the counsel, and take the whole general

33 management and direction of all of said Henry Diehl's litigations and professional business matters, which he should procure or be employed in.

7. This defendant further answering avers and alleges that on or about the 31st day of October, 1888, this defendant retained and employed the said Henry Diehl as her attorney and counsel on his sole and separate account, for the purpose of advising her in
34 all the matters connected with the estate of her deceased husband, John Henry Fricke, and for the purpose of all proceedings relating to the probate of the last Will and Testament of her said deceased husband, in which said Will said defendant was designated as sole executrix and beneficiary, for which services this defendant agreed to pay to the said Henry Diehl, a reasonable compensation, and the said Henry Diehl accepted, and entered upon such retainer and employment.
35

8. This defendant further answering, avers and alleges upon her information and belief, that thereupon said Henry Diehl under and in pursuance of the terms and conditions of his contract with said firms hereinbefore recited and set forth, retained and employed the said plaintiff, and said defendant Ernest H. Morgan, of the said firm of Morgan & Morgan, to give to said Henry Diehl their general assistance,
36 counsel and advice and the time and the attention of their assistants and office staff, in all of the matters and proceedings connected with the probate of said Will, in which said Henry Diehl had been retained and employed by this defendant as aforesaid, and to carry on and conduct the same in said firm name of Morgan & Morgan, all of which they promised, undertook and agreed to do.

9. That said plaintiff and said defendant Ernest H. 37
Morgan thereupon rendered and performed legal services to and for said Henry Diehl, at his special instance and request in matters appertaining to the probate of the said Will, under and in pursuance of the terms and conditions of their agreements with said Henry Diehl hereinbefore set forth from on or about the 1st day of November, 1888, until about the first day of July, 1889, when the said Ernest H. Morgan withdrew from the active participation in the practice and busi- 38
ness of his said firm, and shortly thereafter entirely withdrew from said firm of Morgan & Morgan, and on or about the 1st day of June, 1890, the business of the firm of Morgan & Morgan was continued by the remaining partners, said plaintiff and said defendant Robert J. Hare Powel. That after the retirement of said Ernest H. Morgan, on the 1st day of July, 1889, as aforesaid, said plaintiff alone thereafter gave his general assistance, counsel and advice to the said 39
Henry Diehl in said matters and affairs of this defendant, until on or about the 1st day of July, 1890, when said plaintiff became ill and incapacitated, and from thenceforth by reason of his said illness and incapacity wholly failed and neglected to assist, counsel, advise, render or perform any service whatsoever to said Henry Diehl; and by reason whereof the entire labor, conduct and charge of said matters of defendant devolved upon said Henry Diehl, and other attorney and counsel thereafter employed by this defendant 40
said Georgeanna Diehl, then Georgeanna Fricke.

10. That the said Henry Diehl has duly performed all the conditions of the contract hereinbefore set forth on his part, and between the said 13th day of December, 1881, and the said 1st day of February, 1891, at divers times has duly paid to the said plaintiff

41 and his various law firms aforesaid, forty per centum of all the fees, retainers, profits and compensations received by and arising out of all the lawsuits, business and matters procured by, or in which said Henry Diehl was concerned or employed on his sole and separate account up to the time of the aforesaid alleged illness and disability of plaintiff.

11. That the services relating to the proceedings for the probate of said last Will and Testament and re-
42 ferred to in this separate defense, numbered "Second," are the same services referred to in the complaint in this action.

Third.—And this defendant further answering the said complaint and as a separate and distinct defense thereto avers and alleges, that before this action, this defendant settled with and paid said Henry Diehl in full for all services including those relating to the
43 probate of said Will, rendered by said Henry Diehl to this defendant, and also in full for all services rendered to said Henry Diehl by plaintiff and his said several law firms.

Fourth.—And this defendant further answering the said complaint and as a further, separate and distinct defense thereto avers and alleges that the said supposed cause of action therein set forth did not accrue at any time within six years next before the com-
44 mencement of this action.

Fifth.—And the defendant Georgeanna Diehl further answering the complaint in this action and for a counterclaim to the cause of action set forth in the said complaint alleges upon her information and belief as follows:

1. That at the times hereinafter mentioned the

plaintiff William B. Morgan and defendant Robert J. Hare Powel were partners carrying on a law business in the said City of New York under the firm name of Morgan & Powel. 45

2. That at the times hereinafter mentioned one Henry Diehl was an attorney and counsellor-at-law duly admitted to practice in all the courts of the State of New York.

3. That between the first day of February, 1891, and the first day of May, 1892, the said Henry Diehl at the special instance and request of the above named plaintiff, and of the above named defendant Robert J. Hare Powel and upon their special request and retainer, rendered and performed legal services to and for said firm of Morgan & Powel aforesaid, as their attorney and counsel in divers causes, suits and business, and like service at their request in drawing, copying and engrossing divers instruments and other papers in writing, and in counseling and advising them, and for divers journeys and other attendances done and performed by the said Henry Diehl in and about the said suits and business. 46 47

4. That such services were reasonably worth the sum of Nineteen hundred and sixty-seven 68/100 dollars ($1,967.68).

5. That no part of said sum has been paid. 48

6. That on or about the 15th day of May, 1897, and before the commencement of this action the said Henry Diehl duly assigned, transferred and set over to the said defendant Georgeanna Diehl his entire claim for the legal services aforesaid and for any and all sum or sums of money due and owing to him from said firm of Morgan & Powel on account thereof,

and that the said defendant Georgeanna Diehl then became and has ever since been the lawful owner thereof.

Wherefore, this defendant Georgeanna Diehl demands judgment that the complaint herein be dismissed with costs and that she have judgment in her favor against said plaintiff William B. Morgan and said defendant Robert J. Hare Powel, composing the said firm of Morgan & Powel, for the sum of ($1,967.68) Nineteen hundred and sixty-seven 68/100 dollars with interest thereon, from the 1st day of May, 1892, together with the costs of this action.

CHRISTIAN G. STORKE,
Attorney for Defendant GEORGEANNA DIEHL,
Office and Post Office address,
No. 231 Broadway,
New York, N. Y.

STATE OF NEW YORK, }
County of New York, } ss.:

GEORGEANNA DIEHL, being duly sworn, says that she is defendant in the above-entitled action; that the foregoing amended answer is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

GEORGEANNA DIEHL.

Sworn to before me this 31st }
day of January, 1898. }

JOHN SEITZ,
Commr. of Deeds,
N. Y. County.

Plaintiff's Further Amended Reply.

NEW YORK SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

WILLIAM B. MORGAN,
Plaintiff,

against

GEORGEANNA DIEHL, formerly Georgeanna Fricke, ERNEST H. MORGAN and ROBERT J. HARE POWEL,
Defendants.

The amended reply of the plaintiff to the counterclaim of the defendant Diehl, set forth in her amended answer, respectfully shows to the Court:

1st. Upon information and belief, he denies the allegations set forth in the defendant Diehl's answer by way of counterclaim contained in Sections numbered "3" and "4" and "5" of subdivision numbered "Fifth" of said amended answer at folios 22 and 23 thereof.

2nd. Plaintiff has no knowledge or information sufficient to form a belief as to the allegation set forth in the defendant Diehl's answer by way of counterclaim and contained in Section numbered "6" of subdivision numbered "Fifth" of said answer at folio 24 thereof, and he therefore denies the same.

3rd. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff alleges that down to the first day of February, 1891, and for

57 some years prior thereto, the said Henry Diehl was a clerk in the law office of the said firm of Morgan & Powel, at a regular weekly salary of $12. That after said first day of February, 1891, the said Henry Diehl rented from the said firm of Morgan & Powel one room in their suite of law offices and continued to occupy said room down to the 1st day of May, 1892, under his lease from said firm. And the plaintiff avers that the services, if any, alleged to have been
58 performed by the said Henry Diehl for plaintiff and Robert J. Hare Powel, or either of them, or for the firm of Morgan & Powel, were volunteered by said Henry Diehl, and were rendered gratuitously and without any contract, request or promise of payment therefor.

4th. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff alleges that during the times stated in said counterclaim the
59 plaintiff was in poor health and necessarily absent from his office for a portion of said time, and that the services alleged to have been rendered by said Henry Diehl were done voluntarily by him, if at all, for the purpose of retaining the good will and business of plaintiff and that of said firm of Morgan & Powel, and that said Diehl and the said Powel on or before November 1st, 1891, formed or attempted to form a copartnership under the firm name and style of Powel
60 & Diehl, and continued said business of Morgan & Powel and said Diehl derived the benefit and advantage of whatever he had done by succeeding to said business and was fully compensated thereby for any and all the alleged services rendered by him.

5th. And further replying to said counterclaim and as a separate and further defense thereto, plaintiff avers that the said Henry Diehl has never rendered

any bill for the services alleged in said amended 61
answer to have been rendered to the firm of Morgan & Powel between the 1st day of February, 1891, and the 1st day of May, 1892, nor stated any account therefor, and that the said Henry Diehl had no contract or agreement express or implied with said firm of Morgan & Powel or with anyone on their behalf, as to the time or measure of compensation for his alleged employment, if any there was, and that such alleged services, if any, rendered by said Henry Diehl 62
were sundry and various and independent of and unconnected with each other and were not a continuous service.

And plaintiff further avers that no notice of the alleged transfer or assignment to the defendant Diehl of the claim of said Henry Diehl against the firm of Morgan & Powel for the sum of $1,967.68, alleged in the said amended answer was given by the said Henry Diehl, or the said defendant Diehl or by anyone on 63
their or either of their behalfs to the plaintiff or his attorneys or to anyone on his or their behalfs, and plaintiff had no knowledge or notice of said alleged transfer or assignment, until the 31st day of January, 1898, on which day such notice was given to him by the service upon said attorneys of the amended answer and bill of particulars of said defendant Diehl; except that on the 4th day of October, 1897, said defendant's attorneys served upon said plaintiff's attorneys an answer containing a counterclaim (stated therein to 64
have been obtained by the defendant Diehl by assignment from said Henry Diehl for the sum of $955, with interest thereon from the first day of May, 1892, being the claim of said Henry Diehl against said plaintiff, alleged in said last mentioned answer, and on the 24th day of November, 1897, said defendant's attorneys served upon plaintiff's attorneys a paper purporting to

65 be a bill of particulars of said counterclaim containing items aggregating $1,967.68, which said alleged bill of particulars contained no specification of the items composing the said counterclaim of $955.

And plaintiff avers that a cause of action accrued to the said Henry Diehl or to the said defendant Diehl against the said plaintiff upon each or any of the twenty-four items stated in said bill of particulars as the 1st to 9th, 11th to 13th and 29th to 40th items all inclusive, aggregating $345, if ever, more than six years prior to the 4th day of October, 1897, and that said twenty-four items and each of them and the cause of action on each and every of them is and are barred by the Statute of Limitations.

And plaintiff further avers that a cause of action accrued to the said Henry Diehl or to the said defendant Diehl against the said plaintiff upon each or any of the eleven items stated in said bill of particulars as the 10th, 14th to 18th, 22nd, 24th, 42nd and
67 44th items, all inclusive, aggregating $565, if ever, more than six years prior to the 31st day of January, 1898, and that said eleven items and each of them and the cause of action on each and every of them is and are barred by the Statute of Limitations.

6th. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff avers that all the said services alleged to have been ren-
68 dered by the said Henry Diehl in said counterclaim, if any, were all fully paid for by said plaintiff, or by his said firm of Morgan & Powel.

7th. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff avers that the services alleged to have been rendered by said Henry Diehl and being respectively specified in the following items of defendant Diehl's bill of par-

ticulars, to wit, the 5th, 7th, 9th, 15th, 19th, 20th, 69
22d, 24th, 25th, 29th, 44th and 45th items thereof were rendered, if at all, to plaintiff personally and were his own personal affairs and had no connection whatever with the business of the firm of Morgan & Powel and are not the subject of a counterclaim to the demand of the plaintiff in this action.

8th. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff alleges 70
that he never authorized or requested the said alleged services to be rendered and he never authorized any other person on his behalf to request the performance of said alleged services and upon information and belief, he alleges that the said Henry Diehl was never authorized or requested by any person thereunto authorized to perform said alleged services.

9th. Further replying to said counterclaim and as a separate and further defense thereto, plaintiff avers 71
that the services alleged in the defendant's bill of particulars to have been rendered to the Manhattan Eye and Ear Hospital between the first day of August, 1891, and the 7th day of February, 1892, and constituting the 10th, 14th, 16th and 21st items of said defendant's bill of particulars, for which charges $25, $25, $25 and $250 respectively are made, were rendered, if at all, by the said Henry Diehl with the full knowledge on his part that the plaintiff was during 72
all such times and for many years previous thereto had been a trustee of the said Manhattan Eye and Ear Hospital, and that all services therefore rendered in said suits and matters by plaintiff and plaintiff's firm were gratuitous and without any expectation of compensation therefor.

That the suit specified in the 21st item of defend-

73 ant's counterclaim was undertaken and begun by plaintiff and his firm before the plaintiff's illness, and plaintiff alleges, upon information and belief, that if the said Henry Diehl continued the same, and acted in the other matters set forth in the said items for said hospital, he thereby undertook either to render his services gratuitously, or that said services were rendered by him under a special retainer by said corporation, and without expectation of payment by said
74 plaintiff or his said firm therefor.

And plaintiff further avers that the said Henry Diehl has never rendered any bill for said services either to him or to the firm of Morgan & Powel, or to said Hospital, or made any demand for payment of said services from either of them, and that the latest in date of said alleged services is alleged to have been rendered more than five years prior to the commencement of this action, and that said Henry Diehl has
75 been guilty of *laches* in not rendering said bill or demanding said payment, and that by reason of such *laches* this plaintiff and the firm of Morgan & Powel are discharged of all responsibility for the same, if any such ever existed.

10th. Further replying to said counter claim, and as a further and separate defense to the 17th, 22d, 23d, 26th and 28th items of the defendant's bill of particulars, plaintiff avers that said items are not for services
76 rendered, but as alleged in said bill of particulars appear to be moneys advanced by the firm of Powell & Diehl for the use of the firm of Morgan & Powell, and are not subjects of a counterclaim in this action and that such parts of said items as are for rents paid were for rents of offices wholly occupied by said Powel & Diehl, and each and every of said items were unauthorized by said plaintiff.

11th. Further replying to said counterclaim and as 77
a further and separate defense to the 29th, 40th, 42nd, 43rd and 45th items of the defendant's bill of particulars, plaintiff avers upon information and belief that these items are charges for business matters which were transacted by the said Henry Diehl & Robert J. Hare Powel working together on joint interest, and that they were compensated for the same by the persons for whom the work was done, and that no just claim exists against the plaintiff therefor. 78

12th. Further replying to said counterclaim and as a further and separate defense to the 14th item of the defendant's bill of particulars, plaintiff avers, on information and belief, that the said note was paid by said Henry Diehl and Robert J. Hare Powel, as a part consideration for the purchase by them of a share of stock in the Lawyers' Title Insurance Company of the par value of $1,000, owned by the firm of Morgan & 79
Morgan, of which firm the said Powel was a member, that the said share of stock was transferred by said Powel to the firm of Powel & Diehl for the consideration of $1,250 or thereabouts, and that at the time of said transfer the sum of $1,570 could have been realized therefor, and that the said Henry Diehl was more than paid for any sum paid or advanced by him to cancel said note, and for such alleged services, in the market value of the said share of stock so 80
received by the firm of which he was a member, and by the appointment of said firm of Powel & Diehl, as examining counsel for the Lawyers' Title Insurance Company, as an incident to the ownership of said share of stock.

Wherefore, plaintiff prays that the counterclaim of

81 the said defendant Diehl be dismissed and that he have judgment as prayed for in the complaint herein.

HAZEL & BENEDICT,
Plaintiff's Attorneys,
Office and Post Office Address,
44 Pine Street,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.:

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WILLIAM B. MORGAN, being duly sworn, says that he is the plaintiff herein; that the foregoing reply is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WILLIAM B. MORGAN.

Sworn to before me this }
83 25th day of April, 1898. }

ROBERT V. S. SAMUELS,
Notary Public,
Kings County.

Cert. filed in New York Co.

84

Defendant's Demurrer to Plaintiff's further amended Reply.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

WILLIAM B. MORGAN, Plaintiff, against GEORGEANNA DIEHL and others, Defendant.	Demurrer to Plaintiff's further amended Reply

FIRST.—The defendant, Georgeanna Diehl, demurs to the separate and further defense contained in subdivision or paragraph numbered "5th" of plaintiff's further amended reply to the counterclaim set forth in said defendant's amended answer, on the ground that said separate and further defense is insufficient in law upon the face thereof.

SECOND.—Said defendant further demurs to the separate and further defense contained in subdivision or paragraph numbered "9th" of plaintiff's said further amended reply to the counterclaim set forth in said defendant's amended answer, on the ground that said separate and further defense is insufficient in law upon the face thereof.

CHRISTIAN G. STORKE,
Attorney for Deft. Georgeanna Diehl,
Office and Post-Office Address,
No. 231 Broadway,
Borough of Manhattan,
New York City.

SUPREME COURT,

1

CITY AND COUNTY OF NEW YORK.

JAMES W. SIMONS and JACOB S. STUDLEY,
Plaintiffs,

against

2 CHARLES T. MELROSE,
Defendant.

To the Sheriff of the County of New York:

It having been made to appear to me by the affidavit of James W. Simons, that a sufficient cause of action exists against the defendant Charles T. Mel-
3 rose, and that the case is one of those mentioned in Article 1st, Chapter 7, Title 1, of the New York Code of Civil Procedure, and that the ground of arrest is fraud and deceit.

You are required forthwith to arrest Charles T. Melrose, the defendant in this action, if he is found within your county and to hold him to bail in the sum of twenty-five hundred dollars, and to return this order with your proceedings thereunder as
4 prescribed by law.

Dated New York, January 28, 1898.

JOHN J. FREEDMAN,
J.

SKIDMORE & SKIDMORE,
Plaintiff's Attorneys,
68 Wall Street,
New York.

SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

JAMES W. SIMONS and JACOB S. STUDLEY,
Plaintiffs,

against

CHARLES T. MELROSE,
Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated January 28th, 1898.

SKIDMORE & SKIDMORE,
Plaintiff's Attorneys.

Office and Post Office Address:
No. 68 Wall Street,
New York, N. Y.

SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

JAMES W. SIMONS and JACOB S. STUDLEY,

against

CHARLES T. MELROSE.

The above named plaintiffs, by Skidmore & Skidmore, their attorneys, complain of the defendant, and allege as follows:

First.—The plaintiff James W. Simons is a resident of Brooklyn, New York, and the plaintiff Jacob S. Studley is a resident of Portland, Me., and the defendant Charles T. Melrose is a resident of the State of Connecticut.

Second.—On or about the 3d day of January, 1896, the defendant, for the purpose of obtaining money from the plaintiffs, falsely, deceitfully and fraudulently represented to them that he, said defendant, was the owner and holder of a final judgment rendered in his favor in the Supreme Court, in the State of Washington, against one Charles Perry, of the City of Seattle, in said State of Washington, in the sum of $28,000, or thereabouts, and that the full amount of said judgment was due and owing him by the said Charles Perry, less the sum of $2,500, and that he had not theretofore given any assignment of such judgment or any part thereof, and that there was no lien upon said judgment of any kind whatever, except for the above sum of $2,500.

Third.—On the faith and strength of the said 13
representations and of the assignment hereinafter mentioned, the plaintiffs herein jointly loaned and advanced to the said defendant the sum of $3,600, on condition that the same should be repaid to them from the first moneys received by defendant from or on account of the said judgment, and to secure the said loan and a pre-existing indebtedness of $12,000 then due from the defendant to plaintiffs, the defendant gave the plaintiffs an assignment of an interest 14
in the aforesaid alleged judgment up to the sum of $15,600.

Fourth.—That said representations and the said assignment were false and fraudulent, inasmuch as the said defendant never had a judgment against the said Charles Perry, of Seattle, State of Washington, either at the time of the making of the said representations and pretended assignment, or at any other time, nor has he now such a judgment, and the whole 15
sum of $3,600 so advanced on the faith and credit of said misrepresentations and of said assignment of the said judgment is now due to plaintiffs, no part thereof having been paid.

Wherefore plaintiffs pray judgment against the defendant in the sum of $3,600, with interest thereon from January 3d, 1896, and the costs of this action.

SKIDMORE & SKIDMORE,
Plaintiffs' Attorneys, 16
68 Wall Street,
New York.

City and County of New York, ss.:

JAMES W. SIMONS, being duly sworn, says, that the foregoing complaint is true to his own knowledge, except as to those matters therein stated to be alleged

17 on information and belief, and as to those matters he believes it to be true.

JAS. W. SIMONS.

Sworn to before me this 28th day of January, 1898.

WM. D. JONES,
Notary Public,
for Kings Co.

Cert. filed N. Y. Co.

18

SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

JAMES W. SIMONS and JACOB S. STUDLEY

19 VS.

CHARLES T. MELROSE.

CITY AND COUNTY OF NEW YORK, SS.:

James W. Simons, being duly sworn, says that he is one of the plaintiffs above named. That a sufficient cause of action exists in behalf of the plaintiffs and against the defendant as prescribed in Section
20 549 of the Code of Civil Procedure of the State of New York, to wit, an action to recover damages for fraud and deceit, inasmuch as the said defendant by falsely, deceitfully and fraudulently representing that he was the owner and holder of a certain final judgment rendered in his favor in the Supreme Court, in the State of Washington, against one Charles Perry of the City of Seattle, State of Washington, in the

sum of $28,000, or thereabouts, obtained from the 21
plaintiffs the sum of $3,600, on the faith and strength of said fraudulent representations, and of an assignment of an interest in the said alleged judgment to the extent of said $3,600, and by means of such false representations and on the faith of an assignment of an interest in said judgment, a copy of which is hereto annexed, obtained from the plaintiffs the sum of Three thousand six hundred dollars, on or about January 3, 1896. The amount in which the plaintiffs have been 22
thereby injured is the sum of $3,600, and interest from January 3, 1896.

That in July, 1897, deponent instructed R. D. Skidmore, Esq., to go to Mr. Taylor, who as deponent was informed by said Melrose, was the attorney of said Melrose in the suit against Perry in which he averred that said judgment had been rendered, to inquire when the money would be received on the judgment, and that said Skidmore went to make such 23
inquiries and thereafter informed deponent that he had learned by such inquiries that there never had been any judgment rendered in said action, final or otherwise, in favor of said Melrose against said Perry, but that on the contrary the said action had been decided in favor of said Perry against said Melrose. And deponent therefore avers that the representations of said Melrose as to said judgment were false and fraudulent. No previous application has been made for this order. 24

JAS. W. SIMONS.

Sworn to before me this 28th day of January, 1898.

WM. D. JONES,
Notary Public for Kings Co.

Certificate filed N. Y. Co.

25 **Assignment Mentioned in Foregoing Affidavit.**

Know All Men by These Presents, That whereas, on or about the day of December, 1895, a final judgment was rendered in my favor in the Supreme Court, in the State of Washington, against one Charles Perry, of the City of Seattle in said State of Washington, in the sum of $28,000 or thereabouts, said judgment having been rendered in an action instituted by me against said Charles Perry to recover for moneys
26 advanced and expended and for damages arising in connection with the promotion of "The Parkside Limited," Company, and

Whereas, The full amount of said judgment is now due and owing me from said Charles Perry, judgment debtor, less the sum of $500, which sum is to be allowed and deducted therefrom, and I have not heretofore given any assignment of said judgment or any part thereof, and there is no lien upon said judgment
27 of any kind whatsoever, except as above, to my knowledge, and

Whereas, James W. Simons of New York City, New York, and Jacob S. Studley, of Portland, Maine, have this day jointly loaned and advanced me the sum of Fifteen thousand six hundred dollars ($15,600.00), in cash upon condition that the same be repaid to them from the first moneys received by me from or on account of the said judgment, and said parties are
28 desirous of being secured for their said loan:

Now This Indenture Witnesseth, That for and in consideration of the aforesaid loan of Fifteen thousand six hundred dollars to me made, the receipt whereof is hereby acknowledged, and for the purpose of better securing the payment of the same to the said Simons and Studley, I have sold, assigned, transferred, and set over, and by these Presents do sell, assign, transfer

and set over unto the said James W. Simons and 29
Jacob S. Studley, and to their Executors and Administrators, an interest in the aforesaid judgment equal to the sum of Fifteen thousand six hundred dollars ($15,600.00), and I do hereby promise and agree that I will forthwith turn over unto the said Simons and Studley, any and all moneys collected or received by me from or on account of said judgment as collected, up to the said sum of Fifteen thousand six hundred dollars, retaining the balance. 30

And, it is hereby further understood and agreed that notwithstanding this assignment I shall be at liberty to collect, receive, compound and discharge the said judgment or any part thereof, and to take all lawful ways and means to recover the same, to sue out executions upon the said judgment for the recovery thereof, and on payment or collection of the same, to acknowledge satisfaction or give other good and sufficient releases and discharges of the said judgment; 31
but said judgment shall not be compounded for a less sum than fifteen thousand six hundred dollars, without first obtaining the consent of the said Simons and Studley.

In witness whereof, I have hereunto set my hand and seal at the City of New York, N. Y., this 3d day of January, in the year 1896.

CHAS. T. MELROSE. [L. S.]

In the presence of 32
D. FRANK LLOYD.

STATE OF NEW YORK, }
City and County of New York, } SS.:

On this 3d day of January, in the year 1896, before me personally came and appeared, Charles T. Melrose, to me known and known to me to be the person

33 described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same.

CHAS. D. INGERSOLL,
Notary Public,
N. Y. Co.

SUPREME COURT,

34 CITY AND COUNTY OF NEW YORK.

JAMES W. ELWELL and JACOB S. STUDLEY,

vs.

CHARLES T. MELROSE.

35 City and County of New York, ss. :

ROBERT D. SKIDMORE, being duly sworn, deposes and says, that in July, 1897, being in Seattle, State of Washington, he went to the office of Mr. Taylor, the attorney who had charge of the legal proceeding brought by Charles T. Melrose against Charles Perry, which legal proceedings were alleged to have resulted in a final judgment entered in favor of Charles Perry, for the sum of $28,000, or thereabouts, mentioned
36 in the assignment of judgment executed by said Melrose to the plaintiffs herein. That deponent did not see said Taylor himself, but saw his partner or managing clerk, Mr. Hyde. That deponent inquired of him in reference to the said alleged judgment in favor of Melrose against Perry, and was informed by him that no judgment, final or otherwise, in favor of said Melrose had ever been entered in said action

against said Charles Perry, but that on the contrary 37
a judgment had been rendered in the case in favor of said Perry against said Melrose. Deponent went to the office of said Taylor to make inquiries in reference to said judgment at the request of Mr. Simons, one of the plaintiffs herein.

R. D. SKIDMORE.

Sworn to before me this 28th day of January, 1898.

WM. D. JONES, 38
Notary Public for Kings Co.
Cert. filed N. Y. Co.

SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

39

JAMES W. SIMONS and JACOB S. STUDLEY,

vs.

CHARLES T. MELROSE.

City and County of New York, ss.:

JACOB S. STUDLEY, one of the plaintiffs in this 40
action, being duly sworn, says that he has heard read the affidavit of James W. Simons hereto annexed, and the same is true.

That deponent wrote to the Clerk of the Supreme Court, in the State of Washington. making inquiry in reference to the suit against said Perry, and was informed by the said Clerk that no judgment had

ever been rendered in favor of said Melrose against Perry. J. S. STUDLEY.

Sworn to before me this 26th day of January, 1898.

WM. D. JONES,
Notary Public for Kings Co.

Cert. filed N. Y. Co.

SUPREME COURT,

NEW YORK COUNTY.

JAMES W. SIMONS and JACOB S. STUDLEY,
Plaintiffs,

against

CHARLES T. MELROSE,
Defendant.

On reading the affidavit of Charles T. Melrose, verified the 2d day of February, 1898, and the summons, complaint, affidavit and order of arrest of the defendant herein, and the other papers upon which said order was granted and heretofore served by the plaintiffs upon the defendant, and

On motion of Leonard D. Mandler, attorney for the defendant, Charles T. Melrose, it is

Ordered, that the plaintiffs herein show cause at Special Term, Part I. of this Court, to be held at the County Court House in the City of New York on the 7th day of February, 1898, at ten thirty o'clock in the forenoon or as soon thereafter as counsel can be

heard, why the order of arrest of the defendant herein 45
heretofore made, should not be vacated, and why the defendant should not have such other or further relief as may be just with the costs of this motion.

Service of a copy of this order and of the papers upon which it is granted made on the attorneys for the plaintiffs on the 3d day of February, 1898, before three P. M., shall be sufficient.

Dated, New York, February 3d, 1898.

46 JNO. J. FREEDMAN.

SUPREME COURT,

NEW YORK COUNTY.

47 JAMES W. SIMONS and JACOB S. STUDLEY,
Plaintiffs,

against

CHARLES T. MELROSE,
Defendant.

48 STATE OF NEW YORK, }
County of New York, } ss.:

CHARLES T. MELROSE, being duly sworn, says that he is the defendant in the above entitled action.

That a warrant of arrest has been issued therein, and that he was arrested thereunder on the 28th day of January, 1898; that the defendant furnished bail in the sum of Two thousand five hundred dollars

49 ($2,500) and was discharged on the same day; that the summons, complaint, order and affidavits upon which the same was granted, were on the same day served upon the defendant; that the defendant has appeared in the action by his attorney, Leonard D. Mandler, but has not answered or demurred to the plaintiff's complaint; that the grounds of arrest stated in the order are fraud and deceit.

That an order to show cause is asked for because
50 defendant's reputation and standing in the community and defendant's business interests are hazarded, prejudiced and greatly injured by the continued existence of such an order of arrest, and will be irreparably impaired by its continued existence.

That no previous application for an order to show cause has been made herein.

CHARLES T. MELROSE.

51 Sworn to before me this 2d day of February, 1898.

SAMUEL S. SIMSON,
Notary Public (241),
County of N. Y.

52

SUPREME COURT, 53

CITY AND COUNTY OF NEW YORK.

JAMES W. SIMONS and JACOB S. STUDLEY,

v.

CHARLES T. MELROSE. 54

City and County of New York, ss.:

ROBERT D. SKIDMORE, being duly sworn, deposes and says: That when he went to the office of Mr. Taylor, the attorney of Mr. Melrose in the legal proceeding against Perry referred to in the assignment of interest in said judgment by said Melrose to the plaintiffs, and inquired as to said judgment of Mr. Hyde, 55 who had charge of the office during the absence of said Taylor, said Hyde showed to deponent the proceedings in the case, to wit, a bundle of documents and letters, which deponent examined, and from such examination, as well as from the statements of Mr. Hyde, deponent learned that no judgment existed or had ever existed in favor of said Melrose against said Perry.

R. D. SKIDMORE.

56

Sworn to before me, this 5th day of February, 1898.

WM. D. JONES,
Notary Public for Kings Co.

Cert. filed N. Y. Co.

1 NEW YORK SUPREME COURT.

HULDA HOLZHEIMER

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY.

2

On reading and filing the annexed affidavit of Charles H. Peirce, duly verified on the 4th day of November, 1897, and on the pleadings in the action begun in the Superior Court of the City of New York by Daniel Morton against the New York Elevated Railroad Company and the Manhattan Railway Company, this plaintiff having since been substituted for the plaintiff in that action, and the supplemental complaint and answer to the supplemental complaint herein, and the order granting the substitution of this plaintiff for said Morton, and the motion papers upon which said order was founded, and the opinion of the Appellate Division in the case of Ruth R. Carman against the Manhattan Railway Company,

3

4 decided in the Third Department in July, 1896, and upon all the proceedings in this action, it is

Ordered, that either of the defendants, or both of them, shall show cause at a Special Term of this Court, to be held at Part I. thereof, at the County Court House, in New York City, on the 8th day of November, 1897, at 10:30 A. M., why plaintiff should not be permitted to amend the supplemental complaint herein, in the manner and form of the proposed

supplemental complaint hereto annexed, and for such other relief as to the Court may seem proper.

Service of this order on or before the 6th day of November, 1897, shall be sufficient.

Dated New York, November 5th, 1897.

ABRAHAM R. LAWRENCE,
Justice S. C.

[Endorsed] : "Filed Dec. 1, 1897."

NEW YORK SUPREME COURT.

HULDA HOLZHEIMER

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY.

City and County of New York, ss. :

CHARLES H. PEIRCE, being duly sworn, says that he is of counsel for the plaintiff. That when the supplemental complaint herein was served, to wit, on the 20th day of November, 1895, under the order herein entered November 20, 1895, plaintiff's counsel prepared said supplemental complaint in entire compliance, as he supposed, with Section No. 544 of the Code of Civil Procedure, confining himself to alleging material facts which occurred after his former pleading; and furthermore, in accordance with a practice that had grown up in this class of cases covering a long period, in which supplemental complaints similar in form had been received in the Courts and upon

which, after proof, the substituted plaintiff had been decreed an injunction in the same manner as if he had owned the premises at the time of the commencement of the action. Plaintiff's counsel was never advised in any way that this form of supplemental complaint was faulty, or that a substituted plaintiff, complaining in such form of supplemental complaint, could not obtain the main relief sought, namely, an injunction, until the decision by the Appellate Division in July, 1896, in the case of Ruth R. Carman against the Manhattan Railway Company. The procedure in this case has been practically, if not quite, identical with the procedure in that case.

This action has, however, not been tried; but is No. 142 on the General Special Term calendar of this Court, and is about the twentieth case following the present day calendar. It is apparent to deponent that a break in the day calendar would bring this case on for trial so soon that the ordinary eight days' notice of motion, and the subsequent twenty days in which to serve an answer to the supplemental complaint, in case the motion is granted, would prevent the plaintiff from being able to answer ready when the case is reached.

No previous application has been made for this order, except that a similar order on this affidavit was made by Mr. Justice Pryor on October 19, 1897, and the motion denied with leave to renew, upon the service of a copy of the proposed supplemental complaint.

C. H. PEIRCE.

Sworn to before me this 4th day of November, 1897.

FRANK W. GORETH,
Com'r of Deeds,
City and County of New York.

[Endorsed]: "Filed Dec. 1, 1897."

SUPREME COURT, 13

COUNTY OF NEW YORK.

HULDA HOLZHEIMER,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY, 14
Defendants.

The plaintiff, by W. G. Whiting, her attorney, for an amended supplemental complaint, complains against the defendants, and for a cause of action alleges:

15

FIRST.—Upon information and belief, that each of the defendants is a domestic corporation, duly incorporated, organized and existing by and under the laws of the State of New York, having its place of business and residence exclusively in the City of New York.

SECOND.—Upon information and belief, that the plaintiff is now, and for some years has been, the owner in fee of the following described premises 16 situated upon Ninth Avenue, in the City of New York, to wit:

All that certain lot, piece or parcel of land, with the buildings and improvements thereon erected, now known by the street Number 407 Ninth Avenue.

That the plaintiff has been in possession of said premises ever since her ownership of the same, and

17 is now in possession of said premises. That plaintiff has occupied and has been in possession of said premises by her tenants for a period of more than three years.

THIRD.—Upon information and belief, that the said premises above described were conveyed to the plaintiff by deed of Daniel Morton (duly recorded in the office of the Register for the City and County of New York) on March 22, 1894, and that since said
18 date Daniel Morton, the original plaintiff in this action, duly assigned to plaintiff all his cause of action against the defendants for the injury done by them to the abutting premises in question by the construction, maintenance and operation of their elevated railroad in front thereof. Thereafter, on petition of the plaintiff, an order was entered herein substituting the plaintiff in this action in the place of said Daniel Morton, former plaintiff.

19

FOURTH.—Upon information and belief, that Ninth Avenue is now and for some years has been a public street.

That the interest and title which the City of New York has in and to said Ninth Avenue is held by the City in trust for the maintenance of said street as a public street and highway, and in such manner as public streets or highways are generally used and maintained. And plaintiff avers that she was and is
20 seized and possessed of an easement in said street to that extent, and as hereinafter stated, and was and is entitled to the right to have such street kept and used as a public street, and only as such, and the right to the free and undisturbed enjoyment of the same for the purpose of light, air and ventilation of the said premises, and of the right to the free and uninterrupted passage along the said street as a public street for the

benefit of said premises, and of the usual and unim- 21
paired access to the said premises; and to be protected against interference with the enjoyment by plaintiff and by the said premises of such rights and advantages, and to be protected against any extraordinary use or appropriation of said street, or for any purpose detrimental to the quiet enjoyment and occupation thereof, not required for the use of said street as a public street.

22

FIFTH.—Upon information and belief, that as an incident and appurtenant to plaintiff's ownership and occupancy of said premises, the plaintiff has and had in said Ninth Avenue, fronting the said premises above described, the right, interest and easement to its free and unimpaired use, for the usual and ordinary purposes of a public street or highway, and to exemption from noise, odors, influx of smoke and cinders, obstructions, extraordinary jarrings, and such other disturbances and annoyances as are not incident to or 23
connected with the ordinary use of a public street, and to the usual ingress and egress to and from said premises, and to all other rights, privileges, benefits and advantages to which the owners of property abutting on any of the public streets in said City of New York are entitled in and to said streets, and which this plaintiff would have enjoyed but for the wrongful acts of the defendants as hereinafter set forth. 24

SIXTH.—Defendants' structure, and present form of structure, defendants' cars and engines, and the construction and operation thereof are of a permanent and continuous nature, and are so made and used that they will do damage in the future as they do now, or a yet greater damage of a similar nature.

25 SEVENTH.—Upon information and belief, that upon said premises was during the times later mentioned and now is erected a large and valuable building owned by plaintiff.

EIGHTH.—Upon information and belief, that the defendant the New York Elevated Railroad Company was the owner of a railroad running through Ninth Avenue and other streets and avenues in the City of New York, and past and in front of plaintiff's
26 premises.

NINTH.—Upon information and belief, that the said railroad is now, and has been for some years past, in the possession of and operated by the defendant the Manhattan Railway Company, for a time as lessee of the defendant the New York Elevated Railroad Company, and now as owner.

27 TENTH.—Said present railroad is supported by lines of columns placed high over the bed of the street, and said columns support cross-girders and frameworks, upon which are laid railroad tracks. That the trains and locomotives of said defendants in passing plaintiff's premises produce and hitherto produced a flickering and obscurity in the light, and deprive and have hitherto deprived plaintiff of the beneficial use of such light as does come to said premises.

28 That for some years past the said former railroad and the present railroad and tracks have been operated and used by the Manhattan Railway Company, with the consent of the New York Elevated Railroad Company. That the operation of said railroad is not an ordinary street use of said street authorized by law.

That said structure as it now exists, and as above described, has been erected and maintained without

legal right, as herein later set forth, and is a special 29
injury to plaintiff and her premises.

ELEVENTH.—Upon information and belief, that on the road thus constructed the defendants, or one of them, every day ran and still does run many trains of cars propelled by steam.

TWELFTH.—Upon information and belief, that said railroad and structure greatly obstructed and still do greatly obstruct the said Ninth Avenue and the pas- 30
sageways to and from said building; that they excluded and still do exclude the light and air from the same; that smoke escaped and was unnecessarily emitted, and still does escape and is unnecessarily emitted from engines, and grease, oil, water, cinders, ashes and other objects fell and were unnecessarily emitted, and still fall and are unnecessarily emitted from passing trains upon said premises. That the structure caused and still does cause an addi-
tional and extraordinary amount of snow and ice to 31
form and lie upon and in front of said building and premises. That the trains made and still do make a loud and disagreeable noise, and shook and still shake said building and caused and still cause a vibration, which impaired and weakened and still impairs and weakens the said building, and endangered and still endangers its stability. That the value of the use and occupation of said premises has thereby been greatly diminished. 32

THIRTEENTH.—Upon information and belief, that said road and structure impose and did impose a new and additional burden upon said property, not included in the easement in said street granted to the public, and that the Legislature had no right to authorize the same without compensating plaintiff for her property thus taken.

33 FOURTEENTH.—Upon information and belief, that the defendants have not taken any proceedings to condemn the interest of plaintiff or her predecessors in title in the avenue in front of said premises for the use of their railroad.

FIFTEENTH.—Upon information and belief, that for a period of more than six years prior to the commencement of this action and also since the com-
34 mencement of the same, plaintiff and the prior owners have been unable to obtain from their tenants the rents which they would have obtained, but for the wrongful acts and injuries done and committed by above defendants, as above set forth, and plaintiff and former owners have been deprived of the increased rental which they would otherwise have obtained. That plaintiff and her assignor, said Morton, have been obliged to reduce their rents on
35 account of said acts and injuries, and have received in rents from the tenants of said premises $500 a year less than they would have received if the said wrongful acts and injuries had not been done and committed by the above defendants as above set forth. That but for the wrongful acts and injuries done and committed by above defendants as above set forth, the fair market value of plaintiff's said premises would be upward of five thousand dollars in excess of what it now is, and the rental value thereof up-
36 ward of five hundred dollars per annum in excess of what it now is, and that the erection of said railroad and structure has diminished, and will continue to diminish the said rental value of said premises at least five hundred dollars per year, and plaintiff and her assignor have already sustained damages in the total amount of at least the sum of six thousand dollars.

SIXTEENTH.—Upon information and belief, that 37
the property of the defendant the New York Elevated Railroad Company is mortgaged for all that it cost or is worth, and the defendant the Manhattan Railway Company has little or no property except stock in its co-defendant, and in a similarly mortgaged corporation. That defendants have little if any pecuniary responsibility, and that the injuries complained of are and will be constant and continuous, and that to prevent a multiplicity of suits, and to afford plaintiff 38
adequate relief, the equitable interference of this Court is necessary. That upwards of eight hundred suits are pending against the defendants for injuries and wrongs of a similar nature to those set forth herein, and in which damages amounting to many millions of dollars are claimed; and over one hundred judgments for small and large amounts have been obtained against defendants which defendants have not paid, but, on the contrary, defendants delay payment or a final result in said judgments by re- 39
sorting to dilatory procedure.

Wherefore, plaintiff prays that the amount of rental damages sustained by her and her assignor, said Morton, by reason of the existence of said railroad and structure may be ascertained, and that she may have judgment against the defendants therefor, to wit, for the sum of six thousand dollars, and that the defendants, and each of them, may be perpetually en- 40
joined and restrained, *pendente lite* and after judgment, from further obstructing and encumbering the said Ninth Avenue, and from making any further erection in said Ninth Avenue in front of plaintiff's premises.

That said defendants may also be perpetually enjoined and restrained from maintaining, continuing

41 or operating said railroad and structure now existing in said Ninth Avenue in front of plaintiff's premises as above set forth, and compelled to take down and remove the same, and that plaintiff may have such other and further relief, with her costs, as to the Court shall seem equitable and proper.

W. G. WHITING,
Plaintiff's Attorney.

City and County of New York, ss.:

42 HULDA HOLZHEIMER, being duly sworn, says that she is the plaintiff herein. That she has read the foregoing complaint and knows the contents thereof, and that the same is true to her knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

HULDA HOLZHEIMER.

Sworn to before me this 4th day of Nov., 1897. }
43 }

C. H. PEIRCE,
Notary Public,
N. Y. Co.

[Endorsed]: "Filed Dec. 1, 1897."

44

SUPERIOR COURT

OF THE CITY OF NEW YORK.

DANIEL MORTON

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY.

The plaintiff, by Edward A. Olmsted, his attorney, complains against the defendants, and for a cause of action alleges upon information and belief:

FIRST.—Upon information and belief, that each of the defendants is a domestic corporation, duly incorporated, organized and existing by and under the laws of the State of New York, having its place of business and residence exclusively in the City of New York.

SECOND.—Upon information and belief, that the plaintiff is and for many years has been the owner in fee of the following described premises, situated upon Ninth Avenue in the City of New York, to wit:

All that certain lot, piece or parcel of land, with the buildings and improvements thereon erected, now known by the street Number 407 Ninth Avenue.

That the plaintiff has been in possession of said premises ever since his ownership of the same, and is now in possession of said premises. That plaintiff has occupied and been in possession of said premises by his tenants for a period of more than six years prior to the commencement of this action.

49 THIRD.—Upon information and belief, that the said premises above described were conveyed to the plaintiff by deed duly recorded in the office of the Register of the City and County of New York.

FOURTH.—Upon information and belief, that Ninth Avenue is now and for many years has been a public street, and was laid out, formed and opened under and in pursuance of the provisions of the Act entitled
50 "An Act to reduce several laws relating particularly to the City of New York into one Act," passed April 9th, 1813, and the statutes amendatory of and supplemental to said Act.

That plaintiff and his predecessors in title have paid assessments for the curbing, sewering, paving, grading, flagging and widening of said Ninth Avenue, and have paid large sums of money to the City of New York for other assessments and taxes upon said premises, in reliance upon the right to have the full
51 enjoyment of said Ninth Avenue as a public street, as hereinafter mentioned.

That the interest and title which the City of New York has in and to said Ninth Avenue was acquired and received by the city in trust for the maintenance of said street as a public street and highway, and in such manner as public streets or highways are generally used and maintained. And plaintiff avers that he is and was seized and possessed of an easement in
52 said street to that extent, and as hereinafter stated, and is and was entitled to the right to have such street kept and used as a public street, and only as such, and the right to the free and undisturbed enjoyment of the same for the purpose of light, air and ventilation of the said premises, and of the right to the free and uninterrupted passage along the said street as a public street for the benefit of said premises, and of

the free and unimpaired access to the said premises, 53
and to be protected against interference with the enjoyment by plaintiff and by the said premises of such rights and advantages, and to be protected against any use or appropriation of said street for or by a nuisance, or for any purpose detrimental to the quiet enjoyment and occupation thereof, not required for the use of said street as a public street.

FIFTH.—Upon information and belief, that as an
incident and appurtenant to plaintiff's ownership and 54
occupancy of said premises, the plaintiff has and had in said Ninth Avenue, fronting the said premises above described, the right, interest and easement to its free and unimpaired use, for the usual and ordinary purposes of a public street or highway, and to exemption from noise, odors, influx of smoke and cinders, obstructions, extraordinary jarrings and such other disturbances and annoyances as are not incident to or connected with the ordinary use of a public street, and to 55
the unobstructed ingress and egress to and from said premises, and to all other rights, privileges, benefits and advantages, to which the owners of property abutting on any of the public streets in said City of New York are entitled in and to said streets, and which this plaintiff would have enjoyed but for the wrongful acts of the defendants as hereinafter set forth.

SIXTH.—Upon information and belief, that as plain-
tiff is advised, he was and is seized and possessed of 56
the portion of Ninth Avenue immediately in front of and adjoining the premises before described, to the centre of said street.

SEVENTH.—Upon information and belief, that upon said premises was during the times later mentioned and now is erected a large and valuable building.

57 EIGHTH.—Upon information and belief, that the defendant the New York Elevated Railroad Company is the owner of a railroad running through Ninth Avenue and other streets and avenues in the City of New York, and past and in front of plaintiff's premises.

NINTH.—Upon information and belief, that the said railroad is now, and has been since the month of June, 1879, in the possession of and operated by the defendant the Manhattan Railway Company as the lessee
58 of the defendant the New York Elevated Railroad Company.

That the rights of the said defendant the Manhattan Railway Company as such lessee are derived from a certain agreement and lease made by the said The New York Elevated Railroad Company to the said The Manhattan Railway Company, dated May 20th, 1879, and recorded in the above-mentioned Register's office on June 17th, 1879, in Liber 1493 of Convey-
59 ances, page 311, and a certain contract modifying the said lease, in respect to the rents payable thereunder.

TENTH.—Upon information and belief, that the defendant the New York Elevated Railroad Company had constructed and had been for some time prior to said June 17th, 1879, operating a railroad in Ninth Avenue in front of said premises of different construction. Said present railroad is supported by lines of columns placed in the bed of the street, and
60 said columns support cross-girders and frame-works, upon which are laid railroad tracks. That the trains and locomotives of said defendants in passing plaintiff's premises produce, and have hitherto produced a flickering and obscurity in the light, and deprive, and have hitherto deprived, plaintiff of the beneficial use of such light as does come to said premises.

That since 1879 the said former railroad and the

present railroad and tracks have been operated and used by the Manhattan Railway Company with the consent of the New York Elevated Railroad Company. That the operation of said railroad is not an ordinary street use of said street authorized by law, and is an extraordinary use of such street which defendants have no right to make without compensation to the property owner. 61

That after the defendants rebuilt the old structure and constructed new structures and obstructions, which alterations and new structures and obstructions were of a new, special and additional damage to the plaintiff; and the defendants at a time since the original building of the road began to run, and have since continued to run, additional cars and engines in excess of the number originally run, and run the same with greater frequency, and run the same in such a manner as to cause new and additional damage to the plaintiff. 62

That said structure as it now exists, and as above described, has been erected and maintained without legal right, and is a special injury to plaintiff and his premises. 63

ELEVENTH.—Upon information and belief, that on the road thus constructed the defendants every day ran and still do run many trains of cars propelled by steam.

TWELFTH.—Upon information and belief, that said railroad and structure greatly obstructed, and still do greatly obstruct the said Ninth Avenue, and the passageways to and from said building; that they excluded and still do exclude the light and air from the same; that smoke escaped and was unnecessarily emitted, and still does escape and is unnecessarily emitted from the engines, and grease, oil, water, cinders, ashes and other objects fell and were unneces- 64

65 sarily emitted, and still fall and are unnecessarily emitted from passing trains upon said premises. That the structure caused and still does cause an additional and extraordinary amount of snow and ice to form and lie upon and in front of said building and premises. That the trains made and still do make a loud and disagreeable noise, and shook and still shake said building and caused and still cause a vibration, which impaired and weakened and still impairs and weakens
66 the said building, and endangered and still endangers its stability. That the value of the use and occupation of said premises has thereby been greatly diminished.

THIRTEENTH.—Upon information and belief, that said road and structure impose and did impose a new and additional burden upon said property not included in the easement in said street granted to the public, and that the Legislature had no right to authorize the
67 same without compensating plaintiff for his property thus taken.

FOURTEENTH.—Upon information and belief, that the defendants have never taken any proceedings to condemn the interest of plaintiff or his predecessors in title in the avenue in front of said premises for the use of their railroad.

FIFTEENTH.—Upon information and belief, that
68 for a period of more than six years prior to the commencement of this action and also since the commencement of the same, plaintiff has been unable to obtain from his tenants the rents which he would have obtained but for the wrongful acts and injuries done and committed by above defendants, as above set forth, and plaintiff has been deprived of the increased rental which he would otherwise have ob-

tained. That plaintiff has been obliged to reduce his 69
rents on account of said acts and injuries, and has received in rents from the tenants of said premises $500 a year less than he would have received if the said wrongful acts and injuries had not been done and committed by the above defendants as above set forth. That but for the wrongful acts and injuries done and committed by above defendants as above set forth, the fair market value of plaintiff's said premises would be upward of five thousand dollars in excess of what it 70
now is, and the rental value thereof upward of five hundred dollars per annum in excess of what it now is, and that the erection of said railroad and structure has diminished and will continue to diminish the said rental value of said premises at least five hundred dollars per year, and plaintiff has already sustained damages in at least the sum of five hundred dollars caused by vibration and noise, and the sum of twenty-five hundred dollars caused by the other injuries hereinbefore stated, and has sustained damages in the 71
total amount of at least the sum of three thousand dollars.

SIXTEENTH.—Upon information and belief, that the property of the defendant the New York Elevated Railroad Company is mortgaged for all that it cost or is worth, and the defendant the Manhattan Railway Company has little or no property except stock in its co-defendant and in a similarly mortgaged corpora- 72
tion. That defendants have little, if any, pecuniary responsibility, and that the injuries complained of are and will be constant and continuous, and that to prevent a multiplicity of suits, and to afford plaintiff adequate relief, the equitable interference of this Court is necessary. That upwards of eight hundred suits are pending against the defendants in which

73 damages amounting to many millions of dollars are claimed.

Wherefore, plaintiff prays that the amount of rental damages sustained by him by reason of the existence of said railroad and structure may be ascertained, and that he may have judgment against the defendants therefor, to wit, for the sum of three thousand dollars, and that the defendants, and each of them, may be perpetually enjoined and restrained
74 from further obstructing and encumbering the said Ninth Avenue and from making any further erection in said Ninth Avenue in front of plaintiff's premises.

That said defendants may also be perpetually enjoined and restrained from maintaining, continuing or operating said railroad and structure now existing in said Ninth Avenue in front of plaintiff's premises as above set forth, and compelled to take down and remove the same, and that plaintiff may have such
75 other and further relief, with his costs, as to the Court shall seem equitable and proper.

EDWARD A. OLMSTED,
Plaintiff's Attorney.

[Endorsed]: "Filed Dec. 1, 1897."

76

SUPERIOR COURT

OF THE CITY OF NEW YORK.

DANIEL MORTON,
Plaintiff,

against

THE MANHATTAN RAILWAY COMPANY and THE NEW YORK ELEVATED RAILROAD COMPANY,
Defendants.

Answer.

The defendants, answering the complaint of the plaintiff herein:

FIRST.—Deny any knowledge or information sufficient to form a belief as to each and every allegation contained in the second, third, fifth, sixth, seventh, thirteenth and fifteenth paragraphs of the complaint herein.

SECOND.—Admit that Ninth Avenue was and is a public street in the City of New York, but deny any knowledge or information sufficient to form a belief as to each and every other allegation contained in the fourth paragraph of the complaint herein.

THIRD.—Deny any knowledge or information sufficient to form a belief as to the allegation contained in the eighth and tenth paragraphs of the complaint herein, that the elevated railroad of the defendant the New York Elevated Railroad Company runs past and in front of plaintiff's premises.

FOURTH.—Deny the allegation, contained in the tenth paragraph of the complaint herein, that the de-

81 fendant the New York Elevated Railroad Company had constructed and operated in said Ninth Avenue a railroad of different construction from the present elevated railway; also deny that the description of the elevated railway structure in said Ninth Avenue given in the teuth paragraph of the complaint herein, is a correct description of said structure; also deny any knowledge or information sufficient to form a belief as to the allegations, contained in said tenth paragraph
82 of the complaiut herein, that the trains and locomotives of the defendants in passing said premises produce, and have hitherto produced, a flickering and obscurity in the light, and deprive, and had hitherto deprived, plaintiff of the beneficial use of such light as does come to said premises; also deny the allegation, contained in the tenth paragraph of the complaint herein, that the operation of said railroad is not an ordinary use of said street authorized by law; also deny any knowledge or information sufficient to form
83 a belief as to the allegation contained in the tenth paragraph of the complaint herein, that the operation of said railroad is an extraordinary use of such street which defendants have no right to make without compensation to the property owner; also deny any knowledge or information sufficient to form a belief as to the allegations, contained in said tenth paragraph of the complaint herein, that these defendants have constructed obstructions in said street, and that the
84 structures erected by defendants, or one of them, were of a new, special and additional damage to the plaintiff; also deny any knowledge or information sufficient to form a belief as to the allegation, contained in said tenth paragraph of the complaint herein, that cars and engines have been run upon said structure in such a manner as to cause new and additional damage to plaintiff; also deny the allegation, contained in said

tenth paragraph of the complaint herein, that the said 85
structure, as it now exists, and as described in the complaint herein, has been erected and maintained without legal right; also deny any knowledge or information sufficient to form a belief as to the allegation, contained in said tenth paragraph of the complaint herein, that said structure is a special injury to plaintiff and his premises.

FIFTH.—Deny that grease, smoke, oil, water, cin- 86
ders, ashes or other objects are or were unnecessarily poured from the engines of passing trains of the defendants upon said premises, as alleged in the twelfth paragraph of the complaint herein; also deny any knowledge or information sufficient to form a belief as to each and every other allegation contained in the twelfth paragraph of the complaint herein.

SIXTH.—Deny any knowledge or information sufficient to form a belief as to the allegation, contained 87
in the fourteenth paragraph of the complaint herein, that the plaintiff herein has, or his predecessors in title had, a certain interest in title in Ninth Avenue in front of said premises.

SEVENTH.—Deny each and every allegation contained in the sixteenth paragraph of the complaint herein, beginning with the beginning of said paragraph and extending to and including the words, 88
"have little, if any, pecuniary responsibility"; admit that many actions have been brought against these defendants in this and other Courts of record in the City of New York, but deny the allegation, contained in the sixteenth paragraph of the complaint herein, that the equitable interference of this Court is necessary; also deny any knowledge or information sufficient to form a belief as to each and every other alle-

89 gation contained in the sixteenth paragraph of the complaint herein.

EIGHTH.—Allege that the said railway was constructed according to law, and with the greatest care and skill, and that the said railway has been maintained and operated, and still is maintained and operated, according to law, and with the greatest care and skill; that the locomotives and cars used thereon have the best known appliances for that purpose, and
90 that the engineers and workmen employed thereon are skillful and diligent in the performance of their several duties.

NINTH.—Allege that the said structures were erected for an elevated railway through said street pursuant to the laws of the State of New York, and deny that such erection was made in violation of the Constitution of the State of New York, or of the
91 United States, or in violation of any contract between the City of New York and the plaintiff, or those from whom he derived title, or any other person whomsoever, or in breach of any trust whatever.

TENTH.—Allege, upon information and belief, that the plaintiff is not and never has been in possession of the bed of said Ninth Avenue adjoining and abutting upon said premises to the centre of said street, or
92 of any easement or right therein whatever, other than such as is common to the public.

ELEVENTH.—Allege that the construction of said railway structure in said street was begun by the New York Elevated Railroad Company in or about the year 1878, and that the same was continued until the same was finished, in or about the year 1878; that the operation of said elevated railway was begun

in or about the year 1878, and that the same has been 93
continued from that time to the present; and defendants allege, upon information and belief, that the plaintiff or his predecessor or predecessors in title, during all the time witnessed the said construction and operation, but made no objection or remonstrance against the same, or interfered in any way to prevent the same; and defendants allege, upon information and belief, that the plaintiff herein is barred by his own negligence and acquiescence, and by the negli- 94
gence and acquiescence of his predecessor or predecessors in title, and by the lapse of time, from maintaining this action.

TWELFTH.—Allege, upon information and belief, that for the pretended injuries or causes of action alleged in the complaint, the plaintiff has a complete and adequate remedy at law, and that the plaintiff has no right to invoke the equitable interference of this Court. 95

THIRTEENTH.—These defendants allege that the defendant herein the Manhattan Railway Company is a corporation duly incorporated, organized and existing under and by virtue of an act of the Legislature of the State of New York, passed June 18, 1875, being Chapter 606 of the Laws of 1875, and the acts amendatory thereof and supplemental thereto; that the defendant the New York Elevated Railroad Company 96
was duly incorporated and organized as a corporation under and by virtue of acts of the Legislature of the State of New York, being Chapter 140, Laws of 1850; Chapter 697, Laws of 1866; Chapter 489, Laws of 1867; Chapter 855, Laws of 1868; Chapter 595, Laws of 1875, and Chapter 606 of the Laws of 1875, and the acts amendatory thereof and supplemental thereto; that in accordance with the provisions of Chapter 606

97 of the Laws of 1875, five Commissioners were duly appointed by the Mayor of the City of New York, all of whom accepted the appointment; that such proceedings were thereupon had by the said Commissioners that they did fix, determine and locate a route for the defendant the New York Elevated Railroad Company; that in the route so designated was the said Ninth Avenue in front of the premises described in the complaint herein; the said Commissioners did
98 decide upon a plan for the construction and operation of a railway, with all the necessary sidings, side tracks, stations, switches, turnouts, platforms, stairways and all the necessary appurtenances and appliances belonging to the construction of an elevated steam railway along the said route, and did impose upon and in respect to the building and operating of the said railway, with its appurtenances and appliances, certain conditions and requirements set forth in a certain resolution duly passed by said Commissioners and
99 filed in the office of the said Mayor of the City of New York; that on or about the 6th day of September, 1875, the Mayor, Aldermen and Commonalty of the City of New York duly consented to the erection, maintenance and operation of the said railway and all the appurtenances and appliances belonging thereto, including the appurtenances and appliances described in the complaint herein of the defendant the New York Elevated Railroad Company, along the
100 route designated as aforesaid; that the defendant the New York Elevated Railroad Company made and executed a lease of its railway to the defendant herein the Manhattan Railway Company, as alleged in the complaint herein and as hereinafter set forth; that by virtue of the several acts of the Legislature aforesaid, and the acts amendatory thereof and supplemental thereto aforesaid, and by virtue of the

rity and consent of the State of New York and 101
e Corporation of the City of New York, granted
d conferred upon the defendants, as aforesaid,
defendants were and are duly authorized to
all foundations, superstructures and every other
ure built by the defendant the New York Ele-
Railroad Company, or by the defendant the
attan Railway Company, and described in
omplaint herein, and that the said railway
ures, stations, stairways, platforms, sidings, 102
ies and all the necessary appurtenances and
nces belonging thereto or connected with
naintenance and operation of said railway,
rized as aforesaid, were constructed accord-
o law and with the greatest care and skill,
in accordance with the plans, specifications
requirements of the Commissioners afore-
and that the said The New York Elevated
oad Company and the said Manhattan Railway
any have not constructed, nor has either of them 103
ucted, maintained or operated any structure in
of or adjacent to the said premises that is not
itely necessary to the construction, maintenance
peration of the said railway; that these defend-
vere and are duly authorized to equip said rail-
vith cars, locomotives and other incidents of an
ed steam railway as they have been equipped,
o use and operate the said structures as they
been used and operated, and that said construc- 104
ise and operation have been made in the most
l and skillful manner in which it was and is
le to construct, use and operate the same in the
mentioned in the complaint herein; that prior
3d day of February, 1890, the Manhattan Rail-
Company was the lessee of all the railroads of
ew York Elevated Railroad Company, and that,

105 being such lessee, it took a surrender or transfer of the capital stock of the stockholders of the said The New York Elevated Railroad Company, and issued in exchange therefor stock in its own company, upon the terms and conditions agreed upon between the said two corporations; that prior to the said 3d day of February, 1890, the whole of the said capital stock of the said The New York Elevated Railroad Company was surrendered or transferred in exchange for
106 stock in said Manhattan Railway Company as aforesaid; that thereupon and on or about the 3d day of February, 1890, a certificate of the said facts was duly filed in the office of the Secretary of State, under the common seal of the Manhattan Railway Company; that thereupon the estate, property, rights, privileges and franchises of the said The New York Elevated Railroad Company became vested in, and they were, and they now are, and of right ought to be, held,
107 exercised and enjoyed by the Manhattan Railway Company, in its own name, as fully and entirely, without change or diminution, as the same were before held by the said The New York Elevated Railroad Company.

FOURTEENTH.—These defendants, further answering, allege upon information and belief, that before the commencement of this action and on or about the 15th day of July, 1884, John F. Herrmann, the then
108 alleged owner in fee simple of the premises described in the complaint herein, together with Louise, his wife, executed, duly acknowledged and delivered to Christian F. Zobel, a mortgage upon the premises described in the complaint herein, to secure the payment of a large sum of money, to wit, the sum of $4,500, with interest; that said mortgage was duly recorded in the office of the Register of the City and

County of New York, and that the same remains un- 109
discharged of record, and that the owner thereof has not been made a party to this action.

FIFTEENTH.—These defendants, further answering, allege upon information and belief that more than six years before the commencement of this action, and on or about the 30th day of January, 1883, John F. Herrmann, the then alleged owner in fee simple of the premises described in the complaint 110
herein, executed, duly acknowledged and delivered to Herman Berls a lease of the premises described in the complaint herein for a long term of years, to wit, for the term of four years from the first day of May, 1883, at a certain fixed rental; that said Berls thereupon duly intered into possession of the said premises and remained in possession thereof until the expiration of the said lease, rendering and paying therefor the said fixed rental; that the plaintiff herein did not 111
acquire possession of said premises until after the expiration of said lease.

SIXTEENTH.—Allege, upon information and belief, that the pretended cause or causes of action set forth in the complaint herein did not, nor did any of them, accrue to the plaintiff herein, or to his predecessor or predecessors in title, within six years next preceding the commencement of this action. 112

SEVENTEENTH.—Allege, upon information and belief, that the pretended cause or causes of action set forth in the complaint herein did not, nor did any of them, accrue to the plaintiff herein, or to his predecessor or predecessors in title, within ten years next preceding the commencement of this action.

113 Wherefore, the defendants demand that the complaint herein be dismissed, with costs.

POOLEY, DEPEW & WASHBURN,
Attorneys for Defendants,
32 Nassau Street,
New York City.

STATE OF NEW YORK, }
City and County of New York, } ss.:

DANIEL W. McWILLIAMS, being duly sworn, de-
114 poses and says: That he is Secretary and Treasurer of the Manhattan Railway Company, one of the defendants herein; that he has read the foregoing answer, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why said answer is not verified by said defendant is that said defendant is a domestic
115 corporation; that deponent has derived his knowledge of the facts above set forth from employees, agents and officers of said defendant, and from information acquired by him in the performance of his duties as secretary and treasurer as aforesaid.

DANL. W. McWILLIAMS.

Sworn to before me this 22d }
day of June, 1891. }

116 H. J. HEMMENS,
Notary Public,
N. Y. County.

[Endorsed]: "Filed Dec. 1, 1897."

SUPERIOR COURT 117

OF THE CITY OF NEW YORK.

DANIEL MORTON,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY,
Defendants.

Notice. 118

SIRS:

Please to take notice that on the annexed affidavit of Hulda Holzheimer, and on the annexed assignment of Daniel Morton, dated August 6th, 1894, and on the pleadings and proceedings herein, a motion will be made at a Special Term of this Court, to be held at the Chambers thereof at the Court House in New York City, on the 20th day of November, 1895, at eleven A. M., or as soon thereafter as counsel can be heard, that Hulda Holzheimer be substituted as the sole party plaintiff herein, and that there may be such other and further relief as to the Court may seem proper. 119

Yours, etc.,
W. G. WHITING,
Attorney for Plaintiff and Petitioner,
111 Broadway,
New York City. 120

Dated New York City, this 11th day of November, 1895.

TO POOLEY, DEPEW & WASHBURN, Esqrs.,
Attorneys for Defendants,
32 Nassau Street, New York City.

[Endorsed]: "Filed Nov. 20, 1895."

121 SUPERIOR COURT

OF THE CITY OF NEW YORK.

DANIEL MORTON,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE
122 MANHATTAN RAILWAY COMPANY,
Defendants.

} Affidavit.

City and County of New York, ss.:

HULDA HOLZHEIMER, being duly sworn, says, upon information and belief, that the above-entitled action against The New York Elevated Railroad Company and the Manhattan Railway Company was begun on
123 or about April 23, 1891, to procure an injunction restraining the defendants from operating and maintaining their elevated railway in front of the premises situated on the westerly side of Ninth Avenue, in the City of New York, known as Number 407 Ninth Avenue, and also to recover damages for the impairment of the rental value of said premises caused by the construction, maintenance and operation of said railway; that on or about the 6th day of August,
124 1894, the premises referred to in said action, to wit, Number 407 Ninth Avenue, in the City of New York, together with the easements of light, air and access appurtenant thereto, were conveyed by the plaintiff, Daniel Morton, to the deponent. That since said date plaintiff has assigned to deponent all his cause or causes of action, claim or claims for damages against the defendants or either of them for impairment of

the rental value of said premises caused by the de- 125
fendants or either of them by the construction, maintenance or operation of their elevated structures and trains during the ownership of said assignor in said premises; that deponent has therefore become the real party in interest in this action and desires to be substituted as party plaintiff herein and to prosecute said action against the defendants. Upon information and belief, that this suit has not yet been tried, that issue has been joined herein, and that the same is 126
now Number 317 on the general calendar of the Equity Term of this Court. That the sources of deponent's information and belief are an inspection of the papers in this suit and the statement to the deponent of John Sprunt Ross, an attorney at law in the office of W. G. Whiting, Esq., of counsel in the above-entitled action.

HULDA HOLZHEIMER.

Sworn to before me this 9th day of November, 1895. } 127

JOHN SPRUNT ROSS (74),
Notary Public, N. Y. Co.

[Endorsed]: "Filed Nov. 20, 1895."

128

129 SUPERIOR COURT

OF THE CITY OF NEW YORK.

DANIEL MORTON,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE
130 MANHATTAN RAILWAY COMPANY,
Defendants.

} Petition.

To the Superior Court:

Upon the foregoing affidavit I respectfully request to be made party plaintiff in the above-entitled action, as therein set forth.

HULDA HOLZHEIMER.

131 City and County of New York, ss.:

On this 9th day of November, 1895, before m^e personally came and appeared Hulda Holzheimer, to me known and known to me to be the person described in and who executed the foregoing petition, and acknowledged to me that she executed the same.

JOHN SPRUNT ROSS,
Notary Public,
N. Y. Co.

132

(Title Guarantee & Trust Company Letter Head.)

NEW YORK, 6 Aug., 1894.

In consideration of one dollar and for other value, I hereby assign, grant and release to Hulda Holzheimer all my right, title and interest to all easements used or enjoyed by the Elevated Railroad in

front of the premises 407 9th Ave., in the City of 133
New York, this day conveyed by me to said Hulda Holzheimer; and I do further give and assign to said Hulda Holzheimer all my right, claim and demand against the Manhattan Railway Company, the Metropolitan or the New York Elevated Railroad Company for damages by reason of loss of rent or otherwise, and I appoint her my attorney to collect any such damages. In witness whereof, I have hereunto set my hand and seal this 6th day of August, 134
1894.

DANIEL MORTON [L.S.]

In presence of

JOHN HARDY.

STATE OF NEW YORK, }
City and County of New York, } SS.:

On this 6th day of August, eighteen hundred and ninety-four, before me personally came Daniel Morton, to me personally known, and known to me to be the 135
individual described in and who executed the foregoing instrument, and he thereupon acknowledged before me that he executed the same.

JOHN HARDY,
Notary Public.
City and County of New York.

[Endorsed]: "Filed Nov. 20, 1895."

136

137 At a Special Term of the Superior Court for the City of New York, held at Chambers thereof in the County Court House on the 20th day of November, 1895.

Present—Hon. DAVID MCADAM,
Judge.

138 DANIEL MORTON,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY,
Defendants.

} Order.

139 A motion having been made that Hulda Holzheimer be substituted as sole party plaintiff herein; now after reading and filing the duly verified affidavit and the duly acknowledged petition of Hulda Holzheimer, and the annexed assignment of Daniel Morton, dated August 6th, 1894, and notice of motion and proof of service thereon, and it appearing by said affidavit that the premises described in the complaint herein, together with the cause of action for rental
140 damages to said premises caused by the defendants during the plaintiff's ownership, have been assigned to said Hulda Holzheimer since the commencement of this action, and that said Hulda Holzheimer is now the sole owner of the said premises and the sole party in interest in this action, and after hearing William G. Whiting, Esq., of counsel for plaintiff and said Hulda Holzheimer, in support of the motion,

and Pooley, Depew & Washburn, Esqs., counsel for 141
defendants, in opposition thereto, and due deliberation being had thereupon, it is hereby, on motion of William G. Whiting, attorney for plaintiff and said Hulda Holzheimer,

Ordered, that the said motion be granted and that said Hulda Holzheimer be and she hereby is substituted as sole party plaintiff in the above entitled action in the place and stead of Daniel Morton, and that said action be continued in the name of the said 142
new plaintiff in the place and stead of the above named plaintiff, and that all proceedings heretofore taken in said action stand as the proceedings of the said action as herein continued with the same force and effect as if the same had been taken in the said continued action; and it is further

Ordered, that the plaintiff in the said continued action serve a supplemental complaint setting forth the foregoing facts which have occurred since the commencement of the action, and that defendants 143
have twenty days after service of said supplemental complaint in which to plead thereto; and it is further

Ordered, that the recitals herein shall not be conclusive upon the trial of this action as to the title of the said Hilda Holzheimer or of the right of the plaintiff to maintain this action, or as to any matters of fact recited in this order.

Enter. 144

D. McA.,

J.

[Endorsed]. "Filed Nov. 20th, 1895."

145 SUPERIOR COURT

OF THE CITY OF NEW YORK.

HULDA HOLZHEIMER,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE
146 MANHATTAN RAILWAY COMPANY,
Defendants.

The plaintiff, by this her supplemental complaint, served in pursuance of an order of this Court entered herein on the 20th day of November, 1895, alleges as follows, to wit:

147 FIRST.—That after the commencement of this action, to wit, on the 23d day of April, 1891, the premises in this action were conveyed by Daniel Morton, the former plaintiff herein, to Hulda Holzheimer, the present plaintiff herein, and that since said date the former plaintiff assigned to the present plaintiff all his cause or causes of action against the defendants for damages on account of the impairment of the rental value of the said premises, and that the said
148 Hulda Holzheimer is now the sole owner of said premises and the easements referred to in this action, and is the sole party in interest in this action.

SECONDLY.—That thereafter, to wit, upon the day of November, 1895, on petition of said Hulda Holzheimer, to whom said premises were conveyed and said cause of action assigned as aforesaid, an order was entered in this Court substituting the said

Hulda Holzheimer as sole party plaintiff in this action in the place and stead of Daniel Morton, the former plaintiff herein. 149

Dated New York City, this 20th day of November, 1895.

W. G. WHITING,
Plaintiff's Attorney,
111 Broadway, New York City.

[Endorsed] : "Filed Dec. 1, 1897."

150

SUPERIOR COURT

OF THE CITY OF NEW YORK.

HULDA HOLZHEIMER,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY. 151

The defendants, answering the supplemental complaint of the plaintiff herein, deny any knowledge or information sufficient to form a belief as to each and every allegation contained in the said supplemental complaint. 152

Wherefore, the defendants demand that the complaint and the supplemental complaint herein be dismissed, with costs.

POOLEY, DEPEW & WASHBURN,
Defendants' Attorneys,
32 Nassau Street, New York City.

[Endorsed] : "Filed Dec. 1, 1897."

153 SUPREME COURT

COUNTY OF NEW YORK.

HULDA HOLZHEIMER,
Plaintiff,

against

THE NEW YORK ELEVATED RAILROAD COMPANY and THE
154 MANHATTAN RAILWAY COMPANY,
Defendants.

City and County of New York, ss.:

ARTHUR O. WASHBURN, being duly sworn, says: I am an attorney-at-law and am of counsel for the defendants in this action, and am familiar with all the proceedings had herein. One Daniel Morton, claim-
155 ing to have bought the premises in suit, No. 407 Ninth Avenue, July 20th, 1886, brought an action in equity April 22d, 1891, against these defendants in the Superior Court. He is alleged to have sold said premises to the present plaintiff, Hulda Holzheimer, on or about August 6th, 1894, and on said date it is alleged he assigned his claim for past damages to said Hulda Holzheimer. In November, 1895, Hulda Holzheimer was substituted as plaintiff herein and
156 served a supplemental complaint. In October, 1897, plaintiff moved for leave to serve a new pleading, but failed to annex a copy thereof to her moving papers. Said motion was accordingly denied. I have read the affidavit and order to show cause on the present motion accompanied by a copy of a document entitled an "amended supplemental complaint." Said document contains many of the allegations of the original

complaint and some of those of the supplemental com- 157
plaint, together with many new and different allegations not contained in either. The defendants believe themselves to be entitled to a jury trial of the claim for past or rental damages alleged to have been assigned to the plaintiff and for which she asserts a claim in her present and her proposed pleadings. The defendants demand such jury trial and request the Court to order the same.

The Carman case, referred to as an authority for 158
the granting of the present motion, does not authorize the same and no motion for leave to further supplement or to amend the pleadings in that case has been made on the part of the plaintiff since the decision rendered by the Appellate Division and referred to in the moving affidavit herein. Defendants believe that there is no ground for amending or supplementing the existing pleadings in this case and object to the proposed amended complaint. They, therefore, ask
that the motion be denied, with costs. 159

ARTHUR O. WASHBURN.

Sworn to before me this 11th }
day of November, 1897. }

FRANK D. ALLEN,
Commissioner of Deeds,
City and County of New York.

[Endorsed]: "Filed Dec. 1, 1897."

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